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MEDIALAWLETTER

Reporting Developments Through October 31, 2005

MLRC Brennan Award Recipient
Dr. Jan Moor-Jankowski Dies at Age 81

Dr. Jan Moor-Jankowski, a medical research professor at New York University Medical School who was honored with the MLRC Brennan Award in 1994, died this past August at the age of 81.

Dr. Moor-Jankowski was the defendant in the long and bitterly fought libel case of *Immuno A.G. v. Moor-Jankowski,* a case that helped define the scope of the opinion defense under New York law.

The libel case began in 1983 when Moor-Jankowski, acting as unpaid editor for a scientific journal, published a letter to the editor criticizing the Immuno AG for its use of primates in biomedical research. After all the other defendants in the case settled, Dr. Moor-Jankowski litigated it through two trips to the New York Court of Appeals.

Reviewing the case shortly after *Milkovich v. Lorain Journal* was decided by the U.S. Supreme Court, New York's highest court affirmed dismissal of the complaint, holding that the state gave broader protection to opinion. *See* 77 N.Y.2d 235, 18 Media L. Rep. 1625 (1991).

MLRC Annual Dinner

Wednesday, November 9th, 2005

MLRC is honored to present

A discussion on the reporter's privilege with –

MATT COOPER, TIME Magazine

JUDITH MILLER, The New York Times

JAMES TARICANI, WJAR-TV

CONGRESSMAN MIKE PENCE

Moderated by **DIANE SAWYER, ABC News**

Cocktail Reception at 6:00 P.M.
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"Battle Of The Privileges" in Illinois Supreme Court Justice's Defamation Suit Against Newspaper

By Steven P. Mandell, Steven L. Baron, Brendan J. Healey and Natalie A. Harris

Two recent decisions in a defamation and false light lawsuit filed by Illinois Supreme Court Justice Robert Thomas against a Chicago suburban newspaper raise the possibility that both sides will be able to shield information from the other based on two disparate privileges.

On October 14, 2005, Judge Donald O'Brien of the Circuit Court of Cook County denied Justice Robert Thomas's petition to divest the Illinois Reporter's Privilege citing "first amendment concerns" and other deficiencies in the petition.

A few days later, on interlocutory appeal the Illinois Court of Appeals affirmed the lower court's recognition of an Illinois common-law judicial deliberation privilege. *Thomas v. Page, et. al.*, No. 2-05-0348, 2005 WL 2746327 (Ill. App. Oct. 20, 2005) (Hoffman, Cahill, O'Brien, JJ.).

Both sides will be able to shield information from the other based on two disparate privileges.

As a result of these decisions, the media defendants may not be compelled to disclose the identity of the confidential sources relied upon for the drafting of the editorial columns that criticized Justice Thomas for playing politics in a disciplinary proceeding against a county prosecutor. At the same time, members of the Illinois Supreme Court cannot be compelled to disclose information relating to confidential communications among the justices and their law clerks "made in the course of the performance of their judicial duties and relating to official court business."

The ultimate outcome of the parties' efforts to seek information protected by the Illinois Reporters' Privilege and the judicial deliberation privilege may have a dramatic impact on how the case proceeds in discovery and at trial.

Background

On May 15, 2003, May 20, 2003 and November 25, 2003, the *Kane County Chronicle* published editorial columns, written by columnist Bill Page, addressing the attorney disciplinary case of Kane County State's Attorney Meg Gorecki.

The columns suggested that Illinois Supreme Court Justice Robert R. Thomas may have been influenced by political calculations when deciding Ms. Gorecki's punishment. In particular, the editorial column published on May 15, 2003 reported that Justice Thomas was "pushing hard for various sanctions, including disbarment. Other Justices do not agree with him, at least two opting for simple censure, but Thomas' pressure could result in a single 'compromise' – a year's suspension of Gorecki's law license."

On November 20, 2003, the Illinois Supreme Court issued its opinion, suspending Ms. Gorecki's law license for four months. In the November 25, 2003 column, Mr. Page expressed his opinion that "the four-month suspension [issued by the Illinois Supreme Court] is, in effect, the result of a little political shimmy-shammy. In return for some high profile Gorecki supporters endorsing Bob Spence, a judicial candidate favored by Thomas, he agreed to the four-month suspension."

Justice Thomas Files Suit

Following the publication of the columns, Justice Thomas filed a claim for defamation and false light against Mr. Page, managing editor Greg Rivara, and the *Kane County Chronicle*. He alleged that he never tried to influence his fellow Justices as to the length or severity of sanctions to be imposed upon Ms. Gorecki during the course of her attorney disciplinary proceedings.

Defendants moved to dismiss the complaint on the grounds that the complained of statements contained in the columns: 1) do not fall within the limited categories of statements actionable as *per se* defamation; 2) are reasonably susceptible to an innocent construction and 3) are expressions of opinion, protected under the First Amendment. The court denied defendants' motion to dismiss, and the parties commenced discovery.

Non-Party Justices' Judicial Deliberation Privilege

During the course of discovery, defendants issued subpoenas *duces tecum* and subpoenas for deposition to six of the members of the Illinois Supreme Court (every Justice but the

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plaintiff) and plaintiff's law clerks, seeking information related to the subject editorial columns and attorney disciplinary proceedings. The non-party justices and law clerks subsequently filed motions to quash the subpoenas on the grounds that a judicial deliberation privilege protected the information sought was protected from disclosure.

In answers to written discovery and during the depositions of Mr. Page and Mr. Rivara, defendants asserted the Illinois Reporter's Privilege in response to various inquiries, including those seeking the identity of defendants' confidential sources relied upon for the subject columns.

Defendants acknowledged that they intend to offer testimony regarding the reliability and veracity of Mr. Page's confidential sources at trial. In response, Justice Thomas filed a motion to divest defendants' reporters' privilege claiming he has the right to test the reliability of sources if Mr. Page is going to testify as to their veracity and reliability.

Battle of the Privileges Begins

In response to the non-party justices' motion to quash, defendants argued that Illinois has never recognized a judicial deliberative privilege and that even if the court decided to recognize such a privilege, it should not apply when a sitting Supreme Court Justice files a complaint putting intra-Court communications at issue. In addition, defendants noted that permitting the non-Party justices to withhold the subpoenaed documents would compromise the defendants' ability to present a viable affirmative defense of substantial truth.

Trial Court Recognizes Deliberation Privilege

The trial judge recognized the existence of a judicial deliberation privilege, emphasizing the application of factors identified by Dean Wigmore for establishing the creation of a privilege against the disclosure of communications.

The court noted that without a judicial deliberation privilege, "the Supreme Court Justices would not be able to communicate with each other on any case before them and this would virtually destroy the relationship between the Justices and could result in the issuance of seven different opinions and/or dissents. It would also result in their opinions not being judged on what they wrote but by the give-and-take as to why they wrote it."

The court concluded that in order to assert the privilege, the non-party justices must submit a privilege log. In a subsequent ruling, the Court also found that the judicial privilege extends to communications between a judge and her clerks but not to communications involving a judge and another judge's clerks or among law clerks.

Questions Certified For Interlocutory Appeal

Following the entry of the orders related to the existence and scope of the judicial deliberation privilege, Judge O'Brien certified several questions for interlocutory review. The threshold certified question posed was: "Does Illinois or should Illinois recognize a judicial deliberation privilege?"

On appeal, defendants argued, among other things, that no Illinois statute or case law supports the adoption of a judicial deliberation privilege. In addition, existing safeguards including absolute judicial immunity provide adequate protection against disclosure of judicial deliberation in most circumstances, obviating the need to adopt a new judicial deliberation privilege.

Absolute Judicial Deliberation Privilege

On October 20, 2005, the Illinois Appellate Court issued its opinion on the certified questions. The Appellate Court acknowledged that the question of "whether Illinois recognizes a privilege protecting judicial deliberations…is one of first impression in Illinois, and [the Illinois Appellate Court's] research … revealed very few cases from other jurisdictions analyzing the question."

The Court noted that "judges frequently rely upon the advice of their colleagues and staffs in resolving cases before them and have a need to confer freely and frankly without fear of disclosure. If the rule were otherwise, the advice that judges receive and their exchange of views may not be as open and honest as the public good requires."

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In addition, the court suggested that "if the confidentiality of … intra-court communications were not protected, judges and their staffs would be subject to the pressures of public opinion and might well refrain from speaking frankly during deliberations."

As a result, the Court concluded that "there exists a judicial deliberation privilege protecting confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business."

Noting the narrowly tailored scope of the newly recognized privilege, the Court went on to hold that "anything less than the protection afforded by an absolute privilege would dampen the free exchange of ideas and adversely affect the decision-making process. Accordingly, we hold that the judicial deliberation privilege which we recognize today is absolute in nature."

"there exists a judicial deliberation privilege protecting confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business."

The Appellate Court remanded the case to the trial court for consideration of whether the newly recognized judicial deliberation privilege protects the information defendants seek. Though the trial court held that Justice Thomas waived his judicial deliberation privilege by filing suit, the Appellate Court decline to address the issue of waiver, leaving unanswered the question of whether individual judges or the court as a whole hold (and can waive) the privilege.

Therefore, it remains unclear whether an individual judge can waive the privilege on behalf of the court without the consent of a majority of the members.

Reporters' Privilege

Claiming that the Illinois Reporter's Privilege was "created to protect whistleblowers, not false witnesses and perjurers," Justice Thomas filed a motion to divest defendants' reporter's privilege asserting that because Defendant Page "intends on affirmatively testifying at trial to the [*sic*] reliability of his allegedly confidential sources, that Plaintiff, Robert R. Thomas, has the right to test that reliability."

The trial court characterized the petition to divest as "basically an equitable argument; *i.e.*, it would be unfair to allow defendants to testify as to the sources' reliability and veracity, thereby buttressing their defense without giving plaintiff the opportunity to tests its assertion by deposing the source witnesses."

However, defendants argued, and the trial court agreed, that plaintiff's petition failed to meet several of the requirements set forth in the Illinois Reporter's Privilege Act for divesture. Specifically, the trial court found Justice Thomas' petition to divest "fatally defective" because it failed to allege or identify any of the following: (1) the specific information sought; (2) that the information sought is necessary to the proof of plaintiff's case; (3) any actual harm or injury; (4) exhaustion of alternate sources; and (5) that the plaintiff's need for disclosure of the information sought outweighs the public interest in protecting the confidentiality of sources of information used by a reporter.

The trial court reserved ruling on the issue of whether Mr. Page will be permitted to testify as to the reliability and veracity of his confidential sources at trial.

Steven P. Mandell, Steven L. Baron, Brendan J. Healey, Suzanne M. Scheuing, and Natalie A. Harris of Mandell Menkes LLC in Chicago represent defendants. Joseph A. Power, Jr. of Power Rogers & Smith, P.C. of Chicago represents plaintiff. The Illinois Attorney General represents the non-party Supreme Court Justices.

Senate Judiciary Committee Holds Second Hearing on Federal Shield Bill

On October 19, the Senate Judiciary Committee, chaired by Pennsylvania Senator Arlen Specter, held its second hearing on the Free Flow of Information Act (HR 3323 and S 1419), a bill to establish a federal reporters shield law.

This past summer the Committee heard from journalists and lawyers who supported recognizing a federal reporters privilege. *See MLRC MediaLawLetter* July 2005 at 61. Deputy Attorney General James Comey, who submitted written testimony criticizing the proposed legislation, cancelled his appearance at the last minute – and Senators expressed a strong interest in hearing the Department of Justice's objections to the bill.

At this month's hearing, Chuck Rosenberg, U.S. Attorney for the Southern District of Texas, testified on behalf of the United States Department of Justice, outlining the Department's objections to the bill. He was joined by two former U.S. Attorneys, Steven D. Clymer, a Cornell Law School Professor; and Joseph DiGenova, now in private practice in Washington, D.C.

[The U.S. Attorney] testified that the bill would "create serious impediments to the Department's ability to effectively enforce the law, fight terrorism, and protect the national security."

The Judiciary Committee also heard from four journalists in support of the bill: New York Times reporter Judith Miller; Anne Gordon, Managing Editor of the Philadelphia Inquirer; Dale Davenport, Editorial Page Editor of The Patriot-News, Harrisburg, PA; and David Westin, President of ABC News.

Judith Miller was a notable witness, testifying in support of the bill approximately three weeks after being released from jail. She had served 85 days in jail for contempt of court for refusing to testify before the grand jury investigating the leak of CIA agent Valerie Plame's identity.

She was released on September 29 after obtaining a release from her source Lewis "Scooter" Libby, Chief of Staff to Vice President Dick Cheney. In a statement she said that Libby "voluntarily and personally released me from my promise of confidentiality."

Her release and testimony set off intense speculation about possible indictments of administration officials for substantive crimes, such as violating the Intelligence Identities Protection Act, or for perjury and obstruction of justice. It also sparked a highly publicized debate in the journalism community over her, and the *New York Times*' role, in the matter. *See MLRC MediaLawDaily* Sept 29 to date.

At press time, Lewis "Scooter" Libby, Chief of Staff to Vice President Cheney was indicted for obstruction of justice, perjury and false statements for telling the FBI and grand jury that he first learned about Plame's identity from reporters, including Tim Russert, Matthew Cooper and Judith Miller. However, according to the indictment (available online at http://www.usdoj.gov/usao/iln/osc/documents/libby_indictment_28102005.pdf) Libby had at least six meetings with other Administration officials on the subject before he spoke to reporters.

The indictment raising a series of interesting questions about the reporters' testimony at trial , including the extent to which confidential discussions with other sources may be relevant.

At the Shield Law hearing in the Senate, Miller, and the other journalists, received a warm reception from Senator Specter. "What has been missed in much of the furor over my case," she said, "is that the recent hand-wringing should not prevent us from recognizing the most enduring truth: reporters, even flawed reporters, should not be jailed for protecting even flawed sources. When the dust clears, I hope that journalists and newsrooms will be emboldened, not confused or angered by what I have done."

The testimony is available online at: http://judiciary.senate.gov/hearing.cfm?id=1637

DOJ Objections

Chuck Rosenberg testified that the bill would "create serious impediments to the Department's ability to effectively enforce the law, fight terrorism, and protect the national security," setting out five specific objections to a privilege in the criminal context.

First, it would replace the Department's voluntary guidelines for issuing media subpoenas with "inflexible, mandatory standards."

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Senate Judiciary Committee Holds Second Hearing on Federal Shield Bill

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Second, the standard to pierce the protection in the bill "imminent and actual harm to national security" is too stringent a standard in national security cases.

Third, the bill would pose serious threats to grand jury secrecy and the confidentiality of on-going criminal investigations by requiring the Government to explain in a public evidentiary proceeding why it requires even non-source information.

Fourth, the bill restricts subpoenas to certain third parties that reasonably could be expected to lead to the discovery of the identity of a source. Rosenberg described this as "impractical," stating it would prevent law enforcement from obtaining material that has nothing to do with media sources.

Fifth, the definition of "covered person" in the bill is too broad and would cover, inter alia, foreign media and foreign news agencies, some of which are hostile to the U.S.

In his colloquy with Senators, Rosenberg stated that the Department's guidelines on issuing subpoenas are working and there's nothing "broken" to be fixed.

His concerns were largely echoed by Professor Clymer. And both suggested that a court assessing a claim of privilege by a reporter be allowed to hear *in camera* evidence on the issue (presumably meaning identifying the source to the court).

Interestingly, Joseph DiGenova testified that he only objected to the creation of an "absolute privilege," and recommended that Congress codify the Attorney General's Guidelines for subpoenaing reporters set forth in 28 C.F.R. § 50.10. The suggestion appeared to intrigue Senator Specter who asked Rosenberg and Clymer whether they would object to that. Both said yes on the ground that codification would take away the Department's flexibility in dealing with these matters.

With reference to the Plame investigation, DiGenova recommended that the government be required to submit "sworn affidavits or sworn testimony" about the essential facts of the crime being investigated before the government can vitiate a privilege.

His law partner, and wife, Victoria Toensing, had co-authored a media amicus brief on behalf of Judith Miller and Matthew Cooper to the D.C. Circuit on this point. The brief argued that there was considerable doubt that the Intelligence Identities Protection Act had been violated. Therefore before enforcing subpoenas against journalists in leak investigations courts should undertake an independent examination of the evidence to see whether the underlying elements of a substantive crime can be met.

DiGenova also briefly waded into the thicket of reporters privilege in the civil context, suggesting in his written statement that it would be unfair for an absolute privilege to apply in libel cases.

Outlook?

Senator Specter reaffirmed his support for a federal shield law during the hearing. Over the next few weeks, he and his staff will likely work on options for the bill and lobbyists and supporters will take their cues from him.

Massachusetts Shield Law Bill Introduced

With the support of state media organizations, Massachusetts State Senator Robert E. Travaglini this month introduced a bill to provide statutory protection for the identity of sources and unpublished material.

The drafters of the bill had considered, among other recent cases, the default judgment entered against the *Boston Globe* in a libel and privacy case after it refused to reveal the identity of confidential source(s). *See Globe Newspaper Co. v. Ayash*, 822 N.E.2d 667 (Mass.), *cert denied,* No. 04-1634, 2005 WL 2414324 (U.S. Oct 3, 2005).

Massachusetts has no statutory protection for confidential sources or unpublished information, but the Supreme Judicial Court has recognized a common law privilege that weighs the public interest in having every person's evidence available against the public interest in the free flow of information. *See, e.g., In the Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596, 574 N.E.2d 373, 19 Media L. Rptr. 1091 (1991) (affirming trial court order quashing grand jury subpoenas issued to reporters to discover the identity of confidential sources).

The bill would substantially strengthen this, providing near absolute protection for the identity of sources whether or not the source has been promised confidentiality. Protection is subject only to an exception to "prevent imminent and actual harm to public security from acts of terrorism" where disclosure "would prevent such harm." The bill would also establish a qualified privilege for notes and unpublished material.

"Covered person" under the bill includes anyone who "engages in the gathering of news and information; and has the intent, at the beginning of the process ... to disseminate the news or information to the public."

Pennsylvania Federal Court Narrows Subpoenas to Reporters in Intelligent Design Trial

Two reporters who have been subpoenaed as fact witnesses in an ongoing federal civil trial over the teaching of "intelligent design" in public schools, only have to verify articles they published about school board meetings where the issue was allegedly discussed. *Kitzmiller v. Dover Area School District,* No. 04 CV 2688, 2005 WL 2387629 (M.D.Pa. Sept. 28, 2005) (Jones, J.).

Eleven parents with children in Dover, Pennsylvania sued the Dover school board in federal court alleging the board's decision to teach "intelligent design" violates the constitutional separation of church and state.

Heidi Bernhard-Bubb, a correspondent for *The York Dispatch*, and Joe Maldonado, correspondent for the a *York Daily Record/Sunday News* were subpoenaed by both sides to testify about a school board meeting they attended and wrote about in their papers. They wrote that school officials discussed creationism at the meeting, but the officials denied that in their depositions.

Plaintiffs sought the reporters testimony and notes about the meeting. They refused to appear for depositions during the summer claiming the reporters privilege. In its September 28 Order, the district court clarified that the reporters would only be "obligated to testify as to the facts set forth in the articles, i.e., what was seen and heard as related in the newspaper article(s)." "[N]o testimony shall relate to unpublished material or information or to the reporters' motivation(s), bias, mental impression, or other information extrinsic to what the Reporters saw and heard, and the Reporters shall not be obligated to reveal any confidential sources."

The reporters were represented by Niles Benn of the Benn Law Firm in York, Pennsylvania.

D.C. Court Addresses Standard for Administrative Agency Subpoenas to Press

In an interesting decision this month, D.C. District Court Judge Royce Lambeth ruled that an energy industry newsletter is covered under a qualified First Amendment reporter's privilege, but that the Commodity Futures Trading Commission (CFTC) overcame the privilege in an investigation of an energy company for violating the Commodities Exchange Act. *U.S. Commodity Futures Trading Commission v. The McGraw-Hill Companies, Inc.*, No. 05-235, 2005 WL 2431262 (D.D.C. Oct. 4, 2005) (Lambeth, J.).

Background

The CFTC has been investigating an energy marketing company for violating the Commodities Exchange Act by manipulating gas prices by, inter alia, reporting false data to Platts, a division of McGraw-Hill, that publishes weekly and monthly indices and price ranges based, in part, on data submitted by participating companies.

CFTC issued an administrative subpoena to McGraw-Hill seeking data submitted by the energy company to Platts, all other communications from the company, and related information such as the formulas and procedures Platts used to publish pricing data. McGraw-Hill objected on the ground that Platts, should not be compelled to reveal confidential information received in the course of news gathering.

Reporter's Privilege

The court first rejected the CFTC's argument that Platts does not qualify for the privilege. "While the record reflects that Platts may not be involved in what is most commonly considered traditional news gathering," he wrote, a qualified privilege "applies to a broad range of news gatherers."

Second, the court considered what standard should apply to a federal agency subpoena, concluding that the interests underlying enforcement matter are "more akin to those in a criminal case than a purely civil matter." It therefore applied a balancing test focusing on the the need for the information and whether the party seeking the information has exhausted all reasonably available alternative sources. *Citing Zerilli v. Smith,* 656 F.2d 705, 713-14 (D.C.Cir.1981).

Here both factors favored enforcing the subpoena. First, the data Platts received from the company, and how it processed it, goes to the heart of proving the data was false and designed to manipulate prices. Second, CFTC had exhausted all reasonable alternative sources for the information. It rejected McGraw-Hill's argument that CFTC first seek the data from other energy companies who might have inadvertently received and retained the data. "This overstates the CFTC's obligation: the CFTC must have exhausted only those alternative sources that are reasonably available, not every other conceivable source." *Citing Zerilli*, 656 F.2d at 714.

Victor Kovner of Davis, Wright & Tremaine, LLP, represented The McGraw-Hill Companies, Inc. in this matter. Anthony M. Mansfield, represented the Commodity Futures Trading Commission.

MLRC Defense Counsel Section Breakfast Meeting

Friday, November 11th
7:00 am
Proskauer Rose Conference Center
1585 Broadway, 26th Floor

RSVP Required

Please contact Kelly Chew at
kchew@medialaw.org for more information

First Amendment Protects Subscriber Lists, Maryland High Court Holds

By Bruce W. Sanford and Bruce D. Brown

In the first decision of its kind by the high court of any state, the Maryland Court of Appeals upheld on First Amendment grounds a trial court order denying a motion to compel production of a publisher's subscriber lists. *Lubin v. Agora, Inc.*, Case No. 128, 2005 WL 2179182 (Md. Sept. 12, 2005).

The seven-judge court unanimously held that government prosecutors cannot obtain the subscriber lists of Agora, a publisher of investment, health, and travel newsletters, without demonstrating a "substantial relation between the information sought and an overriding and compelling state interest." The Court soundly rejected arguments from the appellant Maryland Securities Commissioner that the subscriber-list requests should be held to the standard of a routine agency subpoena or, in the alternative, that the commercial speech doctrine limited the First Amendment protections accorded to Agora and its readers.

The broad constitutional language of the Court of Appeals' opinion is particularly meaningful given the lack of case law on subscriber list protection and the fact that the Court could have affirmed on non-constitutional grounds by finding that the trial judge did not abuse his discretion. In addition, given the growth in recent years of a variety of proprietary databases maintained by publishing, media, and Internet companies, the decision may prove valuable beyond the subscriber-list context.

The subpoenas at issue arose in the context of an investigation into a May 2002 Agora promotional e-mail offering a stock tip based on a writer's "insider information." Through the e-mail, the writer sold a four-page report with the stock recommendation that allegedly caused at least one Maryland resident to invest and lose money. The Maryland Securities Commissioner alleged that the e-mail or report may have violated the antifraud provisions of the Maryland Securities Act. The investigation also concerned whether, through the e-mail, the report, or a subscription-based investment service called the Oxford Club, Agora engaged in individualized investment advice that would subject it to registration requirements under state law.

"Fishing Expedition"

The Maryland Securities Commissioner sued in state court to enforce the subpoenas, and in November 2003, a Baltimore County trial court rejected the government's efforts, characterizing the subpoenas as a "fishing expedition" and holding that the Securities Commissioner had not put forth any "compelling showing" for release of the lists. The Commissioner appealed to the intermediate appellate court, and the Court of Appeals issued a writ of certiorari on its own initiative.

The high court recognized that Agora's subscribers possess a right to anonymity "that the Supreme Court has recognized as important to the unfettered exercise of First Amendment freedoms," and it found that the enforcement of the subpoenas would intrude on those First Amendment rights. The Court of Appeals also rejected the Commissioner's commercial speech arguments, finding that compelling production of the subscriber lists would necessarily reveal the identities of subscribers to numerous Agora publications that would not qualify as commercial speech under the jurisprudence of the United States Supreme Court.

Thus, the Court held that the Commissioner was required – and had failed – to demonstrate a "substantial relation between the information sought and an overriding and compelling state interest." The Court noted that while having access to the subscriber lists might be useful, the Commissioner had shown no compelling need. Likewise, the Court found no nexus between the request for subscriber information and the investigation into possible fraud because the "question of whether advertisements or publications contained false or misleading information may be resolved by examining the text of these communications."

Bruce W. Sanford, Lee T. Ellis, Jr., and Bruce D. Brown of Baker & Hostetler LLP, Washington, D.C. and in-house counsel Matthew J. Turner represented Agora, Inc. The Maryland Securities Commissioner was represented by J. Joseph Curran, Jr., Attorney General of Maryland, and Julie L. Tewey.

Delaware Supreme Court Protects Anonymous Speech in Libel Cases

Public Figure Plaintiffs Must Meet Summary Judgment Standard to Learn Speaker's Identity

In a decision involving speech on the Internet, but applying to traditional publications as well, the Delaware Supreme Court this month held that a public figure libel plaintiff must satisfy a summary judgment standard before obtaining the identity of an anonymous defendant. *Cahill v. Does*, No. 266, 2005 WL 2455266 (Del. Oct. 5, 2005).

This is the first decision on the issue at the state supreme court level – and the unanimous court acknowledged both the historical protection for anonymous political speech and the Internet's role as "a unique democratizing medium."

The standard will be very useful in weeding out what the court called "silly" and "trivia" defamation suits over statements of opinion and hyperbole. Indeed, the court suggested that anonymous or pseudonymous statements on Internet blogs, forums and message boards, are in context generally "either subjective speculation or merely rhetorical hyperbole."

Background

Plaintiffs, Patrick Cahill a local town councilman, and his wife, sued several "John Doe" defendants over a series of anonymous web postings to a forum on local news and issues called the "Smyrna/Clayton Issues Blog." The website was sponsored at the relevant time by Delaware State News and described itself as "your hometown forum for opinions about public issues." The forum is available online at http://newsblog.info/0405 and now includes opinionated comments about the supreme court's decision in this case.

Defendant John Doe No. 1, using the alias "Proud Citizen," posted two allegedly defamatory statements in 2004. The first criticized plaintiff's "failed leadership," calling him a "divisive impediment to any kind of cooperative movement" in the town and went on to state that "anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration."

The second posting referred to plaintiff as "Gahill" – allegedly accusing him of a same sex extra marital affair – and stated he "is as paranoid as everyone in the town thinks he is."

Seeking to serve process on Doe, plaintiff sought to compel the disclosure of his identity from Doe's ISP, Comcast. The trial court ordered disclosure, applying a good faith standard to test the plaintiffs' complaint.

Under the good faith standard, plaintiffs were required to establish: (1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source.

Delaware Supreme Court Decision

The Delaware Supreme Court reversed, ruling that the trial judge applied a standard insufficiently protective of Doe's First Amendment right to speak anonymously.

The court, in a decision by Judge Steele, began by hailing the Internet as "a unique democratizing medium unlike anything that has come before" and recognizing that "anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering. *Citing, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.").

The Appropriate Standard

The parties and amici had presented the court with "an entire spectrum of standards" that could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to survive a motion to dismiss, to a showing of prima facie evidence sufficient to withstand a motion for summary judgment.

The court adopted the latter – a standard along the lines of the leading New Jersey decision in *Dendrite International Co. v. Doe,* 775 A.2d 756 (N.J. App. 2001).

In *Dendrite* the court required the plaintiff to: 1) make efforts to notify the anonymous poster that he is the subject of a subpoena and allow a reasonable opportunity to

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Delaware Supreme Court Protects Anonymous Speech in Libel Cases

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oppose; 2) set forth the exact statements at issue; 3) satisfy the prima facie or "summary judgment standard"; and 4) balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for disclosure.

The Delaware Supreme Court essentially adopted a simplified *Dendrite* standard. The libel plaintiff must make efforts to notify the anonymous defendant. In the Internet context, the plaintiff must "post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted." And the plaintiff must satisfy the summary judgment standard. The court reasoned that the other *Dendrite* prongs were fully subsumed in these two requirements.

As a practical matter, to obtain discovery of an anonymous libel defendant's identity the plaintiff must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff's control* – including defamatory meaning, falsity and actual malice. (The court held that proof of damages is not required under Delaware law to recover nominal or compensatory damages.)

As to actual malice, the court recognized that without discovery of the defendant's identity, satisfying the actual malice element might be difficult. It therefore explained that "we do NOT hold that the public figure defamation plaintiff is required to produce evidence on this element of the claim." Instead, the plaintiff can submit a verified complaint or affidavit to substantiate the actual malice element.

Finally, the court noted:

> we make no distinction between communications made on the internet and those made through other traditional forms of media in determining the standard to be applied. Thus, whenever a defamation plaintiff seeks to unmask an anonymous defendant, we apply the summary judgment standard regardless of the chosen medium of publication.

Applying the Standard

Applying the new standard to plaintiffs' claims, the court found that given the context, no reasonable person could have interpreted Doe's statements as being anything other than opinion.

Among other things, the court noted that the guidelines on the website "specifically state that the forum is dedicated to opinions" and that other postings clearly interpreted Doe's statements as expressions of personal opinion. Thus as a matter of law a reasonable person would not interpret Does statements as stating facts about plaintiff and are they are "incapable of a defamatory meaning."

In a final footnote the court added "We do not hold as a matter of law that statements made on a blog or in a chat room can never be defamatory." Nevertheless, the decision provides strong guidance to courts to look at the unique nature of Internet speech in assessing the meaning and impact of speech in the "blogosphere."

David L. Finger of Finger & Slanina, LLC, Wilmington, Delaware represented the defendant.

Robert J. Katzenstein and Robert K. Beste, III of Smith, Katzenstein & Furlow, LLP, Wilmington, Delaware represent plaintiffs.

US Supreme Court to Revisit Question of Campaign Spending Limits

Court Will Review Divided Second Circuit Decision Upholding Vermont Law

In the landmark case *Buckley v. Valeo*, 424 U.S. 1 (1976) the Supreme Court struck down limits on congressional campaign spending, holding, inter alia, that restricting the amount of money a candidate can spend on his or her campaign violates the candidate's First Amendment right to speak to the electorate. The link between campaign money and the First Amendment, though, is not absolute. The Court in *Buckley* went on to uphold limits on *contributions* to political candidates, holding that limiting third-party contributions to candidates imposes less of a burden on First Amendment rights.

The Supreme Court has not squarely addressed the question of campaign spending limits since *Buckley*. Less than two years ago the Court in a 5-4 decision rejected a constitutional challenge to the Bipartisan Campaign Reform Act of 2002 which created new restrictions on the use of "soft money" and the airing of "issue ads" in federal elections. *See McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003). The Court in *McConnell* essentially found that the campaign finance restrictions were consistent with the contribution limits upheld in *Buckley*.

This term the Court will revisit the spending/contribution distinction having accepted for review the Second Circuit's decision in *Landell v. Sorrell*, 382 F.3d 91 (2004), *cert. granted,* (U.S. Sep 27, 2005).

Vermont's Campaign Reform Law

In *Landell v. Sorrell* a divided Second Circuit panel rejected a constitutional challenge to Vermont's 1997 campaign reform law, Act 64, Vt. Stat. Ann. tit. 17, § 2801-2883, holding that strict campaign spending limits could pass muster under *Buckley*.

The Vermont statute creates spending limits for state election candidates, imposing the following limits per election cycle:

Governor – $300,000
Lieutenant governor – $100,000
Other statewide offices – $45,000
State senator – $4,000 plus $2,500 for each additional seat in the district
County office – $4,000
State representative, single member district – $2,000, two member district – $3,000.

Incumbents may only spend 85% of these amounts – except for incumbent legislators, who may spend 90% of the expenditure limits.

(The statute also creates limits on contributions to candidates which vary by office sought. Contributions to gubernatorial candidates are limited to $400; state senate/county candidates, $300; state representative/local office candidates, $200. Contributions to political parties and political committee are limited to $2,000.)

The Vermont statute was challenged in three separate cases, consolidated for review in *Landell*. The plaintiffs include a Libertarian party candidate, Vermont Right to Life and the Vermont Republican State Committee.

In the course of litigation, Vermont acknowledged that the statute was also a vehicle for litigation to ultimately overturn *Buckley*.

The Second Circuit decision written by Judge Straub, and joined by Judge Pooler, did not expressly go that far. Rather the Court held that though *Buckley* had set a high bar for campaign spending limits, it did not represent a *per se* ban on such limits. Rather, the majority stressed that the "clear language of *Buckley* requires that courts should review expenditure limits with exacting scrutiny." *Landell* 382 F.3d 9 at 107.

Suggesting that *Buckley* was decided on a "slender factual record," the majority reasoned that a "fuller factual record might satisfy the constitutional requirement that expenditure limits be narrowly tailored to a compelling interest." *Id.* at 109.

Strict in Theory, Not Fatal in Fact

The majority examined the factual record and concluded that Vermont had shown two compelling interests in maintaining campaign spending limits: "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials." *Id.* at 124.

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Preventing corruption, the compelling interest that justified contribution limits in *Buckley*, has been given a more expansive interpretation since 1976. In *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000)(*Shrink)*, the Supreme Court stressed that the appearance of corruption "could jeopardize the willingness of voters to take part in democratic governance." *Shrink* upheld contribution limits based on what it called "substantial evidence."

However, the majority in *Landell* acknowledged that spending limits are constitutionally more suspect than contribution limits. Therefore, "considerable evidence," rather than the "substantial evidence" deemed sufficient in *Shrink* is necessary "to demonstrate that unlimited spending is part of the corruption problem, and that spending limits are a necessary and plausible solution." *Landell* 382 F.3d 9 at 115.

Even after examining this evidence at length and determining it to be considerable, the majority deferred to *Buckley*, stating that corruption alone is not a sufficiently compelling interest to justify expenditure limits.

The majority agreed with Vermont's contention that it has a compelling interest in officeholders spending their time doing their jobs rather than fundraising.

However, the majority agreed with Vermont's contention that it has a compelling interest in officeholders spending their time doing their jobs rather than fundraising. "Simply put," the Second Circuit wrote, "every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." *Id.* at 123.

Why then had this reasoning not convinced the Supreme Court in *Buckley*? Judge Straub argued that *Buckley* only alluded to the "time protection" interest in passing because Congress had largely ignored it, and failed to present it in the factual record. Moreover, the Supreme Court could not have anticipated the political changes since 1976 or the particular circumstances in individual states that make "time protection" a compelling interest.

Indeed, Judge Straub argued, since *Buckley* many courts have deemed this interest compelling in the campaign contribution context. Contribution limits without spending limits, Judge Straub argued, exacerbate the problem of candidates devoting excessive time to fund-raising by forcing them to solicit more, smaller donations. Time protection combined with the anti-corruption rationale, therefore, provides a sufficiently compelling interest to limit campaign spending.

A Punt on Narrow Tailoring

Having found the Vermont statute supported by a compelling interest, Judge Straub examined whether it was narrowly tailored, posing three questions;

(1) Are Vermont's interests advanced by the statute?
(2) Can candidates conduct "effective advocacy" under the limits?
(3) Has the government shown that there are no less restrictive alternatives that promote the state's interests as effectively?

He answered the first two questions in the affirmative, but remanded the last to the district court for more thorough factual findings.

As to the first question, the decision rejected the plaintiffs' assertion that the Vermont legislature intended the statute to protect incumbents from challengers. After all, the statute allows challengers to spend more money than incumbents.

Answering the second question, the Court examined whether the limits set by Vermont would "drive the sound of a candidate's voice below the level of notice" based on evidence from past campaigns. *Id.* at 129. The Court found that the spending limits would not radically reduce the amount spent on campaigns in Vermont on average. In fact, the vast majority of candidates would not need to decrease spending at all. Thus, the limits allow for advocacy as effective as that allowed before the limits were in place.

Because the District Court held that expenditure limits were *per se* banned by *Buckley*, it did not discuss whether Vermont had utilized the least restrictive method of advancing its goals. Judge Straub suggests several possible less restrictive alternatives including voluntary public cam-

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paign financing and significantly higher spending limits. However, lacking a factual analysis of these issues, the Appeals Court remanded the matter back to the trial court.

A Dissent and Denial of Rehearing

In a vigorous and voluminous dissent described by one of his circuit colleagues as "a crackling good read," Judge Ralph Winter began by noting that *Buckley* held "without qualification, that government may not limit campaign expenditures by candidates for electoral office."

He also raised some troubling issues regarding how spending limits could affect the media. The Vermont statute contains no exemptions for news media so, Judge Winter cautioned, op-eds, newspaper endorsements, and even ordinary articles may be counted as "expenditures" by the candidate about whom they are written.

Providing information to the press has associated expenses. In addition to Judge Winter's constitutionally significant concerns, there are more mundane issues, such as lost advertising revenue, that will have an impact on the press.

Interestingly, 30 years ago Ralph Winter was counsel to the plaintiffs challenging the federal campaign financing statute at issue in *Buckley*.

This spring, the Second Circuit denied plaintiffs' motion for rehearing en banc by a 7-5 vote. *See* 406 F.3d 159 (2d Cir. 2005). Judges Calabresi, Sack, Sotomayor, Katzmann, and B.D. Parker voted to deny rehearing largely on prudential grounds – and were joined by Straub and Pooler who formed the majority for the panel decision.

Circuit Chief Judge Walker and Judges Jacobs, Cabranes, Raggi, and Wesley voted to rehear. In an interesting dissent from the denial of rehearing, Judge Dennis Jacobs took aim at judicial supporters of campaign finance reform and their doctrinal allies in academia and the media.

"Would any judge," he asked rhetorically, "uphold any limit on political speech if it were not that many constitutional-law professors and news media lend their prestige and voice to such measures?" Adding:

> *Similarly, the news organs are interested players in political controversy. It is a fallacy to think that the press is a reliable defender of speech or that the First Amendment is safe in its hands. True, the mainstream press assiduously defends its own expressive and commercial rights, as well as the rights of those whose speech generates saleable news and those who do not compete with the press for influence (such as skinheads, pornographers, performance artists, and the like). But no one should be surprised that the largest news media, secure in their editorial powers, join avidly in suppressing speech by competing sources of information and opinion at campaign time.*
>
> *One arresting irony of this case is that the present Act can be used to limit the speech of the newspapers and the broadcast media. If a newspaper wishes to publish a story on a candidate and requests a photo, interview, or statement, and if the candidate provides such materials, the value of the ensuing publication counts against the candidate's contribution and expenditure limits. See Landell Dissent, 382 F.3d at 168-69. And in time, Vermont's legislators may conclude that the newspapers and broadcast media so control the public agenda, so forcefully channel legislative energies to serve publishers' views and interests, and so thoroughly monopolize the time of legislators vying for journalistic coverage and approval, that some reasonable limits should be placed on them. The Fourth Estate may be able to defend itself, but under the majority's decision, the Fourth Estate may not be able to get much help in the federal courts of this Circuit.* 406 F3d. 159 (2d Cir. 2005).

Outlook in the Supreme Court

The recent vacancies on the Supreme Court add uncertainty to all of the cases up for review this term and none are more uncertain than this one. Four Supreme Court Justices have indicated an inclination to revisit *Buckley* to allow spending limits in some circumstances. In his *Shrink*

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dissent Justice Kennedy wrote that he "would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than fundraising." Shrink, 528 U.S. 377 at 409.

In their *Shrink* concurrence, Justices Breyer and Ginsburg advocated an approach that makes "less absolute the contribution/expenditure line." *Id.* at 405. Justice Stevens, meanwhile, flatly stated that "Money is property; it is not speech." *Id.* at 398 (Stevens, J., concurring).

On the opposing side, Justices Scalia and Thomas have consistently called for overturning *Buckley* to eliminate the contribution limits. *See Id.* at 418 (dissent of Thomas, J., joined by Scalia, J.).

In *McConnell*, decided two terms ago, Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer voted to uphold the soft-money limitations. Thus, on the present Court, Justices Stevens, Ginsburg and Breyer have recently voted to uphold contribution limits and have expressed a desire to revisit *Buckley* to address the question of limiting campaign spending. Justice Souter has not indicated the same willingness to take on *Buckley's* spending/contribution distinction. While he has not been historically in favor of campaign finance reforms, Justice Kennedy, has presaged the circumstances in *Landell* and explicitly regarded the "time protection" rationale compelling.

Justice Rehnquist was the last member of the Court to have participated in the *Buckley* decision and he voted to strike down campaign spending limits. His replacement's views on the subject are not known, but if Chief Justice Roberts were to follow Rehnquist, for whom he clerked, it is possible the deciding vote will be in the hands of Justice O'Connor or her replacement.

Supreme Court Denies Cert. in *Ayash*

The U.S. Supreme Court this month declined to review a $2.1 million default award against the *Boston Globe. Globe Newspaper Co. v. Ayash*, 822 N.E.2d 667 (Mass.), *cert denied,* No. 04-1634, 2005 WL 2414324 (U.S. Oct 3, 2005).

The $2.1 million award came after a default verdict on liability, when the newspaper refused to name a confidential source for its stories alleging mistreatment of a patient – and former *Globe* reporter – at the Dana-Farber Cancer Institute.

While the articles themselves were also at issue in the case, plaintiff Dr. Lois Ayash sought the name of the source in pursuit of a invasion of privacy claim against the hospital for allegedly releasing confidential peer review information to *Globe* reporter Richard Knox.

When Knox and the *Globe* refused to reveal the confidential source, they were held in contempt and then held in default on Ayash's libel claim against the newspaper. After a trial in which the newspaper was permitted to only present evidence regarding damages, the jury awarded Ayash a total of $4.2 million, equally divided between the hospital and the newspaper.

The *Globe's* petition asked the Court to consider two questions:

1) Does the First Amendment or due process clause of 14th Amendment prohibit a public figure libel plaintiff from recovering default judgments against the press without a showing of falsity or actual malice as contempt sanction for refusing to disclose confidential news sources sought for non-actionable, non-libel claims?

2) Does the First Amendment prohibit forced disclosure of confidential news sources in civil cases in absence of jury issues on essential elements of plaintiff's case?

Newspaper Publisher Hit with $3 Million Damage Award After Being Defaulted for Refusing to Reveal Source

A California judge awarded more than $3 million in default damages this month against a California newspaper publisher who refused to reveal the source(s) for allegedly libelous articles. *Bohl v. Hesperia Resorter*, No. SCV SS68052 (Cal. Super. Ct., San Bernardino County default entered Nov. 2003, damages awarded Oct. 21, 2005).

Two weeks prior to the damage award, the publisher filed for bankruptcy. *See In re Raymond Pryke*, Bankr. No. 05-22000 (Bankr. C.D. Cal. filed Oct. 7, 2005).

This is the sixth case that MLRC is aware of since 1980 in which a default judgment was entered against a media defendant for refusing to reveal sources in a libel case. *See LDRC LibelLetter* Feb. 2002 at 9; and *LDRC LibelLetter* March 2002 at 3 (correction).

Background

At issue were articles published in 1999 and 2000 in the *Hesperia Resorter,* the *Apple Valley News,* and the *Adelanto Bulletin,* local newspapers all owned by Raymond Pryke, about Nancy Bohl, the owner of a counseling service who is married to San Bernardino County sheriff Gary Penrod.

The articles alleged that Bohl's company, The Counseling Team, which provides psychological services to police officers, obtained a contract with the sheriff's office because of her then-dating relationship with Penrod, and that Bohl passed on confidential information about police officers to sheriff's department officials. Headlines on the articles included "Sleeping with Penrod Pays Off" and "Sheriff Penrod Spies on Deputies."

Bohl and her company sued in September 2000, naming as defendants the various newspapers, owner Pryke, and reporter Mark Gutglueck.

During discovery, the defendants refused to reveal the sources for the articles. As a sanction, in November 2003 the trial court entered a default judgment against Pryke, and denied an anti-SLAPP motion filed by Gutglueck

Plaintiff's counsel later publicly stated that following the default Pryke and Gutglueck identified their sources but that these individuals denied being the sources of the allegations. Pryke has publicly stated that he never revealed the sources because he didn't know who they were.

In 2004, plaintiff moved to dismiss the case against the reporter, since the newspapers' owner had already been found liable by the default. On Sept. 1, 2004 Superior Court Judge Christopher Warner granted plaintiff's motion to dismiss the reporter from the case, clearing the way for the damage hearing. *See MLRC MediaLawLetter* Sept. 2004 at 28.

As the damages ruling was pending, the publisher filed for bankruptcy. But his initial filing was dismissed upon a motion by Bohl, on the grounds that it was filed in bad faith while the damages determination was pending. *See In re Raymond Pryke*, Bankr. No. 05-11439 (Bankr. C.D. Cal. dismissed May 10, 2005). Pryke refiled the day after the hearing was held; that bankruptcy petition is pending. *In re Raymond Pryke*, Bankr. No. 05-22000 (Bankr. C.D. Cal. filed Oct. 7, 2005).

Damages Hearing

The hearing on damages was held on October 6. According to the Victor Valley *Daily Press*, at the hearing Bohl and another witness testified about the emotional distress she suffered because of the articles. A real estate appraiser testified that the newspaper publisher's property was worth over $11 million.

Superior Court Judge Christopher J. Warner's award consisted of $1.5 million in compensatory damages and $1 million in punitive damages to Bohl, plus $500,000 in compensatory damages and $10,839.60 in costs to her company.

"As set forth in the complaint and supported by the evidence received, the conduct in question was outrageous," Warner wrote in his decision announcing the award. "Particularly malicious and salacious was 'Sleeping with Penrod Pays Off.'"

"Testimony was compelling,"Warner continued, "particularly with respect to the sensitive nature of the psychotherapist-patient relationship and the reticence of individuals in the law enforcement community to place trust and confidence in another person in an environment where job stresses and crisis situations abound, and trust is not easily gained. The damage done not only to the plaintiffs but to these persons in crisis ('patients') is potentially irremediable."

Prior to the award, Pryke said that he would appeal any judgment against him.

The plaintiff is represented by John Rowell of Cheong, Denove, Rowell & Bennett LLP in Los Angeles. Pryke and the newspapers are represented by Stanley W. Hodge of Victorville, California.

Local New York Weekly Loses Libel Trial

A New York jury ruled in October that a weekly newspaper in Rye, N.Y. libeled a local town official, returning a $105,000 verdict for plaintiff. *Mann v. Abel*, No. 14180/2003 (N.Y. Sup. Ct. Westchester Co. jury verdict Oct. 7, 2005)

The case stemmed from a column by defendant Bernard Abel published in 2002 by the *Rye Brook Westmore News*. Abel founded the newspaper, which is now owned by his son.

The column criticized local attorney Monroe Y. Mann who, in addition to maintaining a practice in Port Chester, also serves as appointed town attorney for the Town of Rye and attorney for the Rye Town Park Commission.

"It is my opinion," the column said, "that one of the biggest players behind the throne in Rye Town is local longtime controversial politico and political hatchet Mann." "It appears," the column continued, "that Mann pulls the strings and [Rye Town Supervisor Robert] Morabito and the puppet [town] board jump."

The column also criticized Mann for his decision denying Abel's request under New York's freedom of information law for information on event rentals of two Rye Town Park Commission properties.

"His government is putting your home and all the information about it on the internet," Abel wrote. "But you cannot find out who rents at Crawford Park and Oakland Beach because you would be infringing on their privacy. Or is it because they don't want the public to know of political favors that are being handed out?"

The case was tried before New York State Supreme Court Justice Linda S. Jamieson. Although plaintiff's counsel argued for compensatory damages of between $300,000 and $500,000, the jury awarded plaintiff $75,000 in compensatory damages and $30,000 in punitive damages.

The newspaper was represented by Jonathan Lovett of Lovett & Gould in White Plains. The plaintiff represented himself, along with Francis B. Mann Jr. (no relation) of Mann & Bent P.C. in White Plains.

Trial Court Denies JNOV in *Boston Herald* Libel Case

On October 19, a Massachusetts trial court mostly denied a defense motion for judgment notwithstanding the verdict in the high profile libel case by Superior Court Justice Ernest B. Murphy against the *Boston Herald* and reporter David Wedge. *Murphy v. Boston Herald*, No. 02-2424B (Mass. Super. Ct. ruling Oct. 19, 2005).

On February 18, a jury awarded Murphy $2,090,000 in compensatory damages for 22 statements in the articles, and by Wedge on the Fox News Channel program "The O'Reilly Factor," about the judge's allegedly lenient treatment of criminal defendants, including making an insensitive comment to a teenage rape victim. *See MLRC MediaLawLetter* Feb. 2005 at 19.

The trial judge did grant the jnov motion as to two of the 22 statements, reducing the award by $80,000.

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CLOSING ARGUMENTS

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http://www.medialaw.org/Litigation Resources/ClosingArguments

$1 Award in Alabama Libel Case

Dispute Between Reporter and Source Led to Trial

An Alabama jury this month awarded one dollar in damages in a libel suit brought against a semiweekly newspaper and the police chief of East Brewton, Ala. *Wiggins v. Mallard*, No. 1030937 (Ala. Cir. Ct. verdict Oct. 27, 2005.) At issue was a misidentification of an arrestee, and a dispute between the newspaper defendant and its police source over who was responsible for the error.

Background

The suit was brought by John Raymond Wiggins (known as "Raymond"), and his son John Raymond Wiggins II (known as "John"), who lived together at 2474 Bradley Road near East Brewton, Ala. An August 9, 2000 article in the *Brewton Standard* reported that a "Raymond Wiggins" of "2724 (sic) Bradley Road" had been arrested on drug charges.

The article was based on a phone interview of East Brewton Police Chief Wilson Mallard by *Standard* managing editor John Wallace, during which Mallard read from a police report about the arrest of three individuals for possession of marijuana and drug paraphernalia. One of those arrested was Clinton Keith Wiggins.

Wallace claimed that Mallard told him that the arrestee's name was "Raymond Wiggins" and that he resided at 2474 Bradley Road. But Chief Mallard claimed that he identified "Clinton Wiggins."

The elder Wiggins, who had been defeated in a campaign for county commissioner the previous month, contacted both Chief Mallard and editor Wallace the day that the article was published. Later that same day, the newspaper published a correction in a special edition.

Wiggins's nevertheless filed suit against Chief Mallard, the city of East Brewton, Wallace and the *Standard*. The suit alleged that Mallard had knowingly gave the newspaper the incorrect name, and that the newspaper had published it with the knowledge that it was false.

Summary Judgment Reversed

The defendants filed summary judgment motions with the trial court. The media defendants argued that "publications regarding arrests are qualifiedly privileged" under Alabama law, and thus the plaintiffs had to show actual malice. Chief Mallard and the city argued that police statements to the newspaper were qualifiedly privileged, unless the plaintiffs could prove spite or ill will. The trial court granted both motions.

On appeal, the Alabama Supreme Court reversed and remanded the case for trial. As to the newspaper and editor, the court held that the privilege for fair reports of criminal charges and investigations applies only if the information in the report is accurate. Since the accuracy of the report depended on a determination of fact of what the chief told the reporter, a trial was necessary.

As to the police chief and the city, the high court held that a qualified-immunity defense could be overcome by evidence of either "common law malice," such as "evidence of hostility, rivalry," or "actual malice," i.e., "reckless of the publication and prior information regarding its falsity." *Wiggins v. Mallard*, 905 So.2d 776, 788, 33 Media L. Rep. 1025 (Ala. 2004). While there was no evidence of ill will between the police chief and plaintiff (they did not know each other) the dispute with the reporter created an issue of fact over knowing falsity, according to the court. *See also MLRC MediaLawLetter* Nov. 2004 at 23.

Trial

During a two-day trial before Circuit Judge Brad Byrne, Chief Mallard testified that he gave Wallace the correct name of the arrestee. Wallace testified that he published what the police chief told him. After one hour of deliberation, the jury found for the plaintiffs, but awarded nominal damages of only $1.

Wallace was represented by George W. Royer, Jr. of Lanier Ford Shaver & Payne, PC in Huntsville, while the newspaper was represented by Christopher Lyle McIlwain of Hubbard, Smith, McIlwain, Brakefield & Prowder, P.C., in Tuscaloosa. M. Kathryn Knight of Vickers, Riis, Murray & Curran, LLC in Mobile represented the city and Mallard.

The Wigginses were represented by Nicholas S. Hare, Jr. and Dawn Wiggins Hare of Hare & Hare in Monroeville.

MLRC Calendar

November 9, 2005
MLRC Annual Dinner
Sheraton New York Hotel and Towers
811 Seventh Avenue on 53rd Street
Cocktail reception at 6pm sponsored by Media/Professional Insurance
Dinner at 7:30pm

November 11, 2005
MLRC Defense Counsel Section Breakfast
Proskauer Rose Conference Center
1585 Broadway 26th Floor

January 26, 2006
MLRC & Donald E. Biederman
Entertainment & Media Law Institute of
South Western Law School
Los Angeles
Legal Challenges of Creativity in a Changing
and Increasingly Regulated Media Environment

September 27-29, 2006
NAA/NAB/MLRC Media Law Conference
Arlington, Virginia

Update: Fourth Circuit Denies Rehearing in *Hatfill v. New York Times*

Times to Petition U.S. Supreme Court for Review

In a per curiam order without opinion, the Fourth Circuit on a 6-6 vote, denied a motion for rehearing and/or rehearing en banc in *Hatfill v. The New York Times Company*, No. 04-2561, 2005 WL 2651160 (4th Cir. Oct. 18, 2005).

In July, a divided panel reinstated plaintiff's libel by implication claim over a series of op-eds by *New York Times* columnist Nicholas Kristof. The columns criticized the FBI's anthrax murder investigation and questioned why the FBI was not looking more closely at plaintiff Stephen Hatfill, a biodefense expert who is still a "person of interest" in the FBI's ongoing investigation. *See* No. 04-2561, 2005 WL 1774219 (4th Cir. July 28, 2005); *MLRC MediaLawLetter* Aug. 2005 at 5.

The federal district court granted the *New York Times'* motion to dismiss, holding that the columns were not defamatory. Reversing, the Fourth Circuit panel held that a reasonable reader could find that the columns accused Hatfill of being the anthrax murderer.

Motion for Rehearing

Six judges, Chief Judge Wilkins and Judges Widener, Luttig, Traxler, Shedd, and Duncan, voted to deny the petition. An equal number voted to grant it: Judges Wilkinson, Niemeyer, Michael, Motz, King, and Gregory.

Judge Wilkinson filed a lengthy dissenting opinion from the order, in which Judges Michael and King joined. He began by noting that:

> "The panel's decision in this case will restrict speech on a matter of vital public concern. The columns at issue urged government action on a question of grave national import and life-or-death consequence. It is unclear, to say the least, that Virginia law would ever find these columns to be defamatory, and the panel pushes state law in a direction that not only portends liability for valuable public commentary but aggravates, rather than alleviates, the constitutional tensions inherent in the defamation field."

Judge Wilkinson argued that the Court should be particularly mindful of the free speech issues at stake at the motion to dismiss stage, and that "viewed as a whole, the columns do not pin guilt on plaintiff, but instead urge the investigation of an undeniable public threat."

The *Times* will petition to U.S. Supreme Court for cert. and the parties have a agreed to a stay of proceedings in the district court while the petition is pending.

The New York Times is represented by David Schulz and Jay Ward Brown, Levine Sullivan Koch & Schulz, LLP. Plaintiff is represented by Thomas Gerard Connolly, Christopher J. Wright, Patrick Pearse O'Donnell and Mark Andrew Grannis, Harris, Wiltshire & Grannis, LLP, Washington, DC.

Hatfill Lawsuit Against Professor, Conde Nast & Readers Digest Raises Similar Issue

Stephen Hatfill is also pursuing a lawsuit in federal court in New York over a magazine article published in 2003 in *Vanity Fair* and *Readers Digest.* The article, entitled "The Message in the Anthrax," suggested that the FBI should focus its anthrax investigation on Hatfill.

The article was written by Professor Donald Foster, a specialist in "literary forensics,"i.e., deducing the identity of anonymous authors. Foster gained attention in 1996 when he published an article "outing" Joe Klein as the author of the novel *Primary Colors.* He has also served as a law enforcement consultant on literary forensics.

The case was filed in Virginia, but was transferred to New York. In a pretrial decision, the New York court rejected Foster's objections to jurisdiction and held that Virginia law would apply to the claims against the publishers *See Hatfill v. Foster*, 372 F. Supp.2d 725 (S.D.N.Y. 2005) (McMahon, J.). Defendants' motions to dismiss are now pending.

Second Circuit Affirms Dismissal of Libel by Implication Claim

The Second Circuit Court of Appeals this month affirmed dismissal of a libel by implication claim filed against a community newspaper. *Seymour v. The Lakeville Journal Company, LLC*., No. 04-6626-CV, 2005 WL 2573985 (2d Cir. Oct. 13, 2005) (unpublished). The panel of Judges Meskill, Newman, and Raggi issued a summary order holding that the article was "not reasonably susceptible to a defamatory connotation."

Background

At issue was a May, 29, 2003, article published by the Lakeville Journal, a weekly newspaper in northwestern Connecticut. The article, entitled "Lawsuit Revelation Spurs Check: Seymour's Car Excise Tax will Now Go to Falls Village," reported that plaintiff received an official notice that she owed back taxes on her car which was registered in one town but actually garaged in another, higher tax town.

Plaintiff, a New York resident with a second home in Salisbury, Connecticut, is the mother of a former First Selectman (effectively, Mayor) of Falls Village, Connecticut, who was the user of the car in question.

Plaintiff alleged that the newspaper article implied that she "deliberately violated state law, concealed her violation, gave a false explanation, and was a tax cheat."

The district court granted the newspaper's 12(b)(6) motion to dismiss finding that an average reader could not reasonably conclude that the article implied that plaintiff intentionally failed to pay taxes. The article noted that plaintiff had paid taxes on her car (albeit to what was asserted to be the wrong town, which imposed a lesser tax rate), included plaintiff's version of events, and, thus, was a balanced report of the whole controversy.

Second Circuit Decision

Affirming, the Second Circuit held that nothing in the article implied that plaintiff was deliberately evading taxes. Like the district court, the Second Circuit panel noted that the article included plaintiff's version of events, quoting extensively from her own press release explaining the matter.

"On these facts," the court reasoned, "no reasonable reader would infer that plaintiff deliberately violated state tax law."

Moreover, the Court held that the article was additionally protected by New York's fair report statute, N.Y. Civil Rights Law § 74 which provides in relevant part that "a civil action cannot be maintained against any ... corporation, for the publication of a fair and true report of any ... official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

"On these facts," the court reasoned, "no reasonable reader would infer that plaintiff deliberately violated state tax law."

Here the newspaper article accurately reported official town proceedings with respect to plaintiff's tax obligations and was therefore immune from suit, citing *McDonald v. East Hampton Star*, 10 A.D.3d 639, 639-40, 781 N.Y.S.2d 694, 695 (2d Dep't 2004); *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67, 424 N.Y.S. 165, 167 (1979).

Although not mentioned by either court, the newspaper's brief to the Second Circuit noted that the plaintiff's Complaint contained a separate allegation that, seven years earlier, the newspaper endorsed the plaintiff's daughter's opponent in her race for First Selectman. The brief suggested that it was that "editorial transgression" that was apparently "the real motivation for this suit."

Ken Norwick, Norwick & Schad in New York, represented The Lakeville Journal. Plaintiff was represented by Peter G. Eikenberry, New York, and former U.S. Attorney Whitney North Seymour, Jr., the husband of the plaintiff and the father of the user of the car in question.

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Ninth Circuit Affirms Dismissal of False Light Claims Brought Against Belo Station by Seattle Public Official

By Bruce E. H. Johnson

On October 3, 2005, the Ninth Circuit, in a memorandum decision, affirmed a Seattle trial judge's summary judgment dismissing false light claims brought by a City of Seattle official against KING Broadcasting Co., a subsidiary of Belo Corporation which owns Seattle television station KING-TV. *Harris v. City of Seattle*, No. 04-35148, 04-35226, 2005 WL 2417118 (9th Cir. Oct. 3, 2005) (Browning, Alarcón, and Kleinfeld, JJ) (unpublished).

In doing so, the Court found the plaintiff had failed to offer sufficient evidence that would support a finding of actual malice by the television station or its reporter.

Background

The lawsuit arose out of KING's hidden-camera coverage, in April 2001, of a taxpayer-funded trip by Ruby Dell Harris, the Secretary and Chief Examiner of the City of Seattle's Public Safety Civil Service Commission, to a Las Vegas conference, where she apparently skipped half of the daytime seminars offered by the conference, and visited the casino's slot machines instead.

The videotapes were featured on two KING broadcasts about allegations of incompetence and mismanagement at the Commission. In short, what happens in Vegas apparently does not always stay in Vegas.

Her gambling activities were monitored by a KING reporter (Duane Pohlman) and filmed by a KING cameraman. The videotapes were featured on two KING broadcasts about allegations of incompetence and mismanagement at the Commission.

In short, what happens in Vegas apparently does not always stay in Vegas.

After the broadcasts, Harris sued the City of Seattle and the Washington Firm and several of its employees. (The Washington Firm was a consulting firm hired by the City which undertook a workplace investigation of Harris, including her supervision of Commission employees and her handling of workplace harassment claims.)

Initially, the plaintiff's claims were filed in state court in Seattle and she alleged violations of her federal civil rights, but after removal and an initial remand order after her civil rights claims were dismissed, she added KING as a defendant and alleged that the station and the other defendants had committed RICO violations while KING was pursuing the news story. The case was then removed to federal court a second time.

Lower Court Proceedings

At the outset of the case (at least at the outset of its second appearance on the court docket), Judge Marsha Pechman of the United States District Court for the Western District of Washington (in an opinion reported at 2003 WL 1045718) dismissed all the defamation claims (for failure to plead with particularity), the unlawful surveillance claims (under Nevada law, the videotaping in a casino's public areas was in a public place), and the RICO claims (Harris failed to plead any predicate act or allege any cognizable injury) – leaving only plaintiff's false light cause of action and a parasitic claim of outrage or intentional infliction of emotional distress.

Thereafter, discovery ensued. Or at least the defendants began to seek discovery. There were some unusual developments in this regard. For example, the plaintiff's deposition was interrupted and rescheduled several times, when the plaintiff repeatedly took ill or took fright and then disappeared from the deposition room and refused or failed to return. After several aborted efforts, the defendants finally finished her deposition.

In February 2004, after the close of discovery, the District Court granted all parties' motions for summary judgment. Regarding the claims against KING, Judge Pechman ruled (315 F. Supp.2d 1105) that Harris was a public official, that she had failed to show actual malice by clear and convincing evidence, and that a requested continuance (prompted by plaintiff's "dilatory" and last-minute discovery efforts on the eve of the discovery cutoff) was not warranted. Judge Pechman also dismissed her claims against the City and the Washington Firm.

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Ninth Circuit Affirms Dismissal of False Light Claims Brought Against Belo Station by Seattle Public Official

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Ninth Circuit Decision

The case was appealed to the Ninth Circuit. In her briefing, Harris focused her attack against KING on the issue of actual malice. She claimed she had offered sufficient evidence to avoid summary judgment; KING argued that she had not.

In its decision, the Ninth Circuit affirmed all of the summary judgment rulings. In its analysis of the claims against KING, the court applied the independent appellate review standard in *Bose v. Consumers Union* and considered each of the plaintiff's items of evidence which, she claimed, would support a finding of actual malice.

First, she claimed that the KING reporter, Duane Pohlman, wanted to "shock the public" with film of her Las Vegas gambling. The court, however, said that "a defendant's bias or editorial slant" is not probative of actual malice. Her assertions were a mischaracterization of the reporter's deposition testimony, in which he simply stated that he wanted "to see how taxpayer money was being spent and what she did at a management seminar."

Judge Kleinfeld would have found that the claims were "frivolous and abusive and that appellant should be sanctioned."

Second, she claimed that Pohlman monitored her casino activities during her lunch hour, as well as during the time she was supposed to be attending the management seminars. But, the court rejected this argument, noting that this was simply evidence that the KING reporter and cameraman "wanted to keep track of her movements."

Third, Harris claimed that KING had failed to note that she had attended some conference-related activities in the evening, after their cameras stopped rolling. The court ruled that this fact was "not probative" of malice. "KING's failure to include Ms. Harris's attendance at nighttime events in its calculation of how much time she spent attending seminars does not support an inference of malice."

Finally, Harris argued that she had "presented evidence refuting the allegations against her" at a press conference following her Las Vegas trip, but the Ninth Circuit, reviewing the record, found no evidence for this assertion. The only evidence about the press conference before the trial court, the court noted, was the portion that was aired on KING's broadcast, which failed to refute any of the videotaped evidence about her gambling activities. That statement, which was included in full in KING Broadcasting's reports, reads as follows:

> HARRIS: I brought back information on, um, productivity, uh, waste management. Information on, uh, there was a speaker, Glenda Hatchet, who did some speaking. Um, information on women, sisters on the move, that kind of information.
>
> POHLMAN: So what do you do? You just go to – what, seminars or something?
>
> HARRIS: They're workshops. And also, evening events. Different events.
>
> POHLMAN: And you – and you went to those, and then brought back that information?
>
> HARRIS: Yes, I did.

As KING had noted in its appellate brief, "these assertions neither controvert KING Broadcasting's statement that she spent only three and one-half hours attending seminars and workshops nor provide any other evidence suggesting that KING Broadcasting was reckless in believing that she skipped some conference sessions." The Ninth Circuit agreed.

In a concurring opinion, Judge Kleinfeld stated that he would have found that the claims were "frivolous and abusive and that appellant should be sanctioned." According to Judge Kleinfeld: "Allowing a public official to pursue frivolous claims against investigators and the media with impunity will deter valuable investigation of government officials by imposing excessive litigation costs on investigating parties."

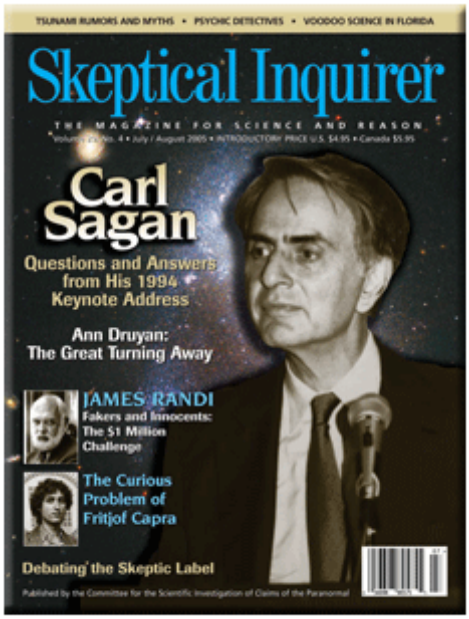
Bruce E. H. Johnson, Jeffrey L. Fisher, and Diana Tate of Davis Wright Tremaine LLP, Seattle, Washington, represented defendant-appellee KING Broadcasting Co. Phil Talmadge and Emmelyn Hart-Biberfeld of Talmadge Law Group PLLC, Tukwila, Washington, represented plaintiff-appellant Ruby Dell Harris; Jennifer D. Bucher and Roger Hillman of Garvey Schubert Barer, Seattle, Washington, represented defendant-sppellee City of Seattle; Jerret E. Sale and Deborah L. Carstens of Bullivant Houser Bailey, Seattle, Washington, represented defendant-appellees The Washington Firm, Ltd., Nina Sanders, Desree Griffin and Kristina Moris.

California Supreme Court To Hear Libel and Privacy Case

Subject of Science Case Study Sues University Researchers

The California Supreme Court recently accepted for review an interesting libel and privacy case against university researchers who published articles and made public statements challenging scientific study about recovered memories of abuse. *Taus v. Loftus*, No. A104689, 2005 WL 737747, 33 Media L. Rep. 1545 (Cal. App. 1 Dist. April 1, 2005) (unpublished), *review granted*, (Cal. Jun 22, 2005).

Plaintiff was the subject of a published case study relating to recovered memories of child sex abuse. The case study generally supported the theory that such memories are true. The author of the study, Dr. David Corwin, spoke about his research at professional conferences, including showing with consent excerpts from taped interviews of plaintiff.



Several university researchers sought to debunk the case study and, more generally, the theory of recovered memories. They published several articles challenging the case study in the magazine *Skeptical Inquirer*, and also spoke about their work at conferences.

Plaintiff sued the researchers, their employer and the magazine. The gist of plaintiff's suit is that the defendants invaded her privacy by piercing the veil of confidentiality that protected her during the case study and using information about her private life to publicly challenge the theories and conclusions advocated by Dr. Corwin, the author of her case study.

In an unpublished decision, the Court of Appeals dismissed claims over the articles published in *Skeptical Inquirer,* but held that plaintiff had made out prima facie claims for private facts, intrusion and libel based on other statements and acts by the researchers.

The private facts claim is based on one defendant's statement at a science conference that hinted at plaintiff's identity – defendant used plaintiff's real initials and said she is now in the Navy. The court reasoned that while the issue of recovered memory was a matter of public interest, there is no public interest in knowing plaintiff's identity which it presumed could be pieced together from the defendant's remarks and the published article.

The intrusion claim is based on allegations that defendants obtained interviews with plaintiff's foster mother by falsely claiming to be working together with Dr. David Corwin.

Finally, the court ruled that the statement made at a conference that "Jane Doe engaged in destructive behavior that I cannot reveal on advice of my attorney. Jane is in the Navy representing our country" could be found to falsely imply plaintiff was unfit to serve in the military. Without citing any authority, the Court of Appeal stated that defendant would bear the burden of proving truth under the circumstances because there is no public interest in plaintiff's fitness to serve in the military.

The California Supreme Court will review whether plaintiff established a prima facie case on her privacy and libel claims to survive a motion to strike.

A more detailed article on the case will be published in next month's newsletter.

Maryland Court Reinstates Trespass Claim Against The Baltimore Sun Over Interview of Former Congressman in Nursing Home

By Jeanette Melendez Bead

In a reported decision, the Maryland Court of Special Appeals last month unanimously reversed a trial court's grant of summary judgment in favor of *The Baltimore Sun* in a trespass action brought by former Congressman Parren J. Mitchell arising out of an interview with the Congressman in his nursing home room. *Parren J. Mitchell v. The Baltimore Sun Company, et al.*, No. 266, 2005 WL 2385972 (Md. Ct. Spec. App. Sept. 29, 2005). (Kenney, Eyler, Deborah S. and Thieme, Raymond G. (Retired, specially assigned) JJ.).

The intermediate appellate court determined that the trial court had erred in granting summary judgment on Congressman Mitchell's claims for trespass and invasion of privacy by intrusion upon seclusion. The court, however, affirmed the trial court's dismissal of a claim for intentional infliction of emotional distress.

Background

Based in part upon a review of public documents, including pleadings in court cases, *Sun* reporters Walter F. Roche, Jr. (now a reporter at the *Los Angeles Times*) and Ivan Penn learned that various creditors were seeking and obtaining judgments against Congressman Mitchell for failure to pay debts that appeared to have been incurred in his name by his nephew, Michael B. Mitchell.

As part of their newsgathering, Roche and Penn went to the Keswick Multi-Care Center in Baltimore, the nursing home in which Congressman Mitchell was then staying, to get Congressman Mitchell's response. Penn registered at Keswick's security desk, and the two reporters then walked to the Congressman's room, where they visited with him for a few minutes in the presence of his private-duty nurse.

Penn and Roche wrote a series of articles describing Michael Mitchell's apparent mishandling of the personal finances of his uncle. Based largely on court records, the articles discussed various debt collection proceedings pending against Congressman Mitchell, some of which appeared to arise out of Michael Mitchell's use of the Congressman's pension and other resources to finance his own interests, and reported allegations that Michael Mitchell had used money in Congressman Mitchell's personal checking account to pay expenses associated with a bar with which Michael Mitchell was associated.

One of the articles reported the comments Congressman Mitchell made to the reporters when they visited him at Keswick, including his strong endorsement of Michael Mitchell's stewardship despite his apparent unawareness of the debts and legal proceedings that had been brought against him.

At the conclusion of discovery, the defendants moved for summary judgment, arguing that Congressman Mitchell could not maintain claims for trespass and invasion of privacy because both he and his private-duty nurse expressly or impliedly consented to the reporters' presence in his room, and that he could not maintain claims for invasion of privacy and intentional infliction of emotional distress because the alleged conduct was neither highly offensive nor extreme and outrageous.

The defendants also argued that the Congressman had failed to proffer any evidence that his alleged distress was severe. The defendants' motion was buttressed by the affidavit of the Congressman's private-duty nurse, who confirmed that the Congressman never asked the reporters to leave his nursing home room and that the reporters had behaved appropriately during their visit. The trial court granted the defendants' motion.

Court of Appeals' Decision

The Court of Special Appeals first concluded that genuine issues of material fact precluded a finding at the summary judgment stage that the Congressman or his private-duty nurse had consented to the reporters' presence in the Congressman's nursing home room or the interview with the Congressman, noting that, if credited, the Congressman's assertion that he answered the reporters' questions only after he asked them to leave and they refused to do so could lead a reasonable trier of fact to conclude that the Congressman did not answer the reporters' questions voluntarily, vitiating any consent.

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Maryland Court Reinstates Trespass Claim Against The Baltimore Sun

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For the same reason, the court held that genuine issues of material fact existed concerning whether the reporters' conduct in the nursing home room was highly offensive, precluding summary judgment in defendants' favor on the invasion of privacy claim.

The Court also rejected defendants' argument that the trial court properly exercised its inherent discretion to discredit *even at the summary judgment stage* certain inherently incredible testimony by the Congressman – specifically, an eleventh hour claim that the reporters rifled through his personal papers during their visit, a claim rendered demonstrably unbelievable based on physical evidence concerning the contents of his room offered by the Congressman himself.

The Court agreed, however, that the defendants were entitled to summary judgment on the Congressman's claim for intentional infliction of emotional distress, finding that the reporters' conduct, even as alleged by the plaintiff, was not extreme and outrageous as a matter of law, and concluding further that the Congressman had failed to proffer sufficient evidence that he suffered extreme distress as a result of it.

The defendants plan a further appeal.

The defendants are represented by Michael D. Sullivan, Jay Ward Brown and Jeanette Melendez Bead of Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. And Dale M. Cohen and David S. Bralow of the Tribune Company. Congressman Parren J. Mitchell is represented by Baltimore attorneys Arthur M. Frank and Larry S. Gibson.

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Cert. Denied in Gates v. Discovery

The U.S. Supreme Court this month declined to review plaintiff's petition for certiorari in *Gates v. Discovery Communications*, 101 P.3d 552, 33 Media L. Rep. 1173 (Cal. Dec. 6, 2004), *cert. denied,* 126 S.Ct. 368 (U.S. Oct 03, 2005) (No. 04-9561).

In *Gates*, the California Supreme Court expressly overruled its 1971 decision in *Briscoe v. Reader's Digest Association, Inc.*, 483 P.2d 34, 1 Media L. Rep. 1845 (Cal. 1971), that had recognized a private facts cause of action over a true report of a criminal conviction.

At issue in *Gates* was an episode of the true crime television series *The Prosecutors* which accurately reported that plaintiff had pleaded guilty to being an accessory after the fact to a murder for hire. Plaintiff argued that although his conviction was a matter of public record he had rehabilitated himself and was entitled to have his identity kept private. Affirming dismissal of the claim, the California Supreme Court recognized that a line of subsequent U.S. Supreme Court cases, including *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469 (1975) and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) made clear that *Briscoe* is no longer good law.

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Federal Court Dismisses Defamation Action Brought by Russian Oligarchs

By Chad R. Bowman

A public watchdog organization and two of its reporters have prevailed on summary judgment in a five-year-old defamation action arising out of a news report linking two powerful Russian industrialists and their companies to organized crime and narcotics trafficking. *OAO Alfa Bank v. Center for Public Integrity*, No. 00-2208 (D.D.C. Sept. 27, 2005).

The companies and the businessmen, two of the handful of Russian "oligarchs" who control that country's newly privatized economy, filed suit in the U. S. District Court for the District of Columbia against the nonprofit Center for Public Integrity (CPI) and writers Knut Royce and Nathaniel Heller.

In a 59-page memorandum opinion, U.S. District Judge John D. Bates held that Mikhail Fridman and Pyotr Aven were public figures, as were the corporations they controlled, OAO Alfa Bank and ZAO Alfa Eco. He then awarded judgment to the defendants because, despite years of discovery, plaintiffs failed to find any clear and convincing evidence of actual malice.

The court also held that, while the CPI article at issue was a fair report of an official Russian investigation that otherwise met the requirements for applying the fair report privilege, the privilege should not extend to reports of the actions of foreign governments.

Background

Following then-Governor George W. Bush's announcement that Dick Cheney would be his running mate in the 2000 general election, Royce and Heller prepared a news story about Cheney's tenure as CEO at Halliburton. The piece was reported over several days and published on August 2, 2000 on CPI's website newsletter, the *Public i*, in advance of the Republican National Convention.

The article, "Cheney Led Halliburton To Feast at Federal Trough; State Department Questioned Deal With Firm Linked to Russian Mob" described Halliburton's government contracts under Cheney's watch (http://www.publicintegrity.org/report.aspx?aid=225).

The article also reported that Halliburton was connected with "a Russian oil company whose roots are imbedded in a legacy of KGB and Communist Party corruption, as well as drug trafficking and organized crime funds, according to Russian and U.S. sources and documents." The article reported that Russian authorities had investigated specific allegations about the oil company and its owners, oligarchs Fridman and Aven and two of their companies, Alfa Bank and commodities trader Alfa Eco.

Royce, a long-time reporter who contributed to three Pulitzer-winning investigations during his career, did the bulk of the reporting on the plaintiffs. Starting with a review of prior press reports, he learned that Halliburton had lobbied for a U.S. loan guarantee for Tyumen, a Russian oil company.

The guarantee by the U.S. Export-Import Bank was initially blocked by the State Department. This unusual veto was due in part to an international dispute over Tyumen's business tactics, including allegations that the company and its leaders manipulated Russian bankruptcy proceedings to acquire assets of oil giant BP Amoco, spurring consternation among international investors and talks between British Prime Minister Tony Blair and Russian President Vladimir Putin. In the United States, the controversy drew press coverage and the attention of Congress, the White House, the National Security Council, the Treasury Department, and the CIA.

A report published in the *Washington Post* had noted that the CIA provided raw intelligence material about Tyumen that included a section titled "criminal situation." Other searches of electronic news archives by Royce turned up articles recounting various criminal allegations about Tyumen, its parent companies in the Alfa Group, and oligarchs Fridman and Aven.

Armed with this background, Royce began contacting his sources in the intelligence community. A CIA source confirmed that the published account about Tyumen "tracked what the agency had." Another source, a former CIA official who was once the agency's chief of station in Russia and whose identity was later discovered by the plaintiffs, provided a translated press item reporting that criminal allegations against Alfa Group and its principals

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Federal Court Dismisses Defamation Action Brought by Russian Oligarchs

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had been sent to the Russian legislature and referred to the Ministry of the Interior for investigation.

Another source, a "Russian-American specialist on business practices in the Soviet Union who had several contacts in the Russian law enforcement community," described that in Russia "no major oil company is free of criminal activity" and provided background on the bare-knuckle business climate in which the plaintiffs and their companies had emerged as victors.

The source explained that Duma Security Committee Chairman Victor Ilyukin had forwarded a 1997 report of allegations about Alfa principals to the Russia Federal Security Bureau (FSB) for investigation, but that "the inquiry had been 'put away for a better day' due to political considerations." After speaking to Royce, the source faxed him a copy of the FSB report.

Seeking additional information, Royce then met with a U.S. customs officer and the former CIA official. Afterward, the former CIA official gave Royce a memorandum describing information provided to him in 1995 by a KGB major, which included similar allegations about the plaintiffs. As such, the KGB major report appeared to Royce to corroborate many of the allegations in the later FSB report.

The fair report privilege would have been met if the documents were of U.S. origin but declined to apply the privilege to an account of a Russian investigation.

On the basis of the two documents, conversations with sources, and prior press accounts, Royce wrote about the criminal allegations that had been leveled against Alfa. Seeking comment, he called spokesmen for the companies, as well as representatives from their public relations and law firms, who denied the allegations and claimed that competitors had planted them. Believing that Aven and Fridman did not speak English, Royce did not attempt to contact the oligarchs individually.

The article was fact-checked by an editor, reviewed by CPI's executive director, and published online.

Fair Report Privilege Inapplicable Overseas

CPI claimed the defense of the fair report privilege, noting that nearly all of the challenged statements in the article were attributed to the FSB report. On summary judgment, the defendants introduced letters from Ilyukin confirming that the Russian lawmaker did in fact receive the report on Alfa and its principals, which had been prepared by "FSB officials who were 'afraid for their professional career'" and which was forwarded to Ministry of the Interior and the FSB for investigation.

Judge Bates held that the fair report privilege would have been met if the documents were of U.S. origin but declined to apply the privilege to an account of a Russian investigation.

"The Court agrees with defendants that each of the ordinary prerequisites to application of the fair reporting privilege is met in this case: the FSB report is an 'official document' for purposes of the privilege, the CPI article paraphrases or draws upon the FSB report, and the CPI article is a substantially accurate account of the report," according to the court.

"Nevertheless, the privilege is unavailable to defendants in this case, because it does not extend to the official reports of the actions of a foreign government."

In finding the fair report privilege limited to domestic proceedings, the court followed *Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir. 1988). Even were the court to decide the privilege on a case-by-case basis in light of the specific country, as urged by other federal courts, Judge Bates found it would nevertheless be inapplicable here because the defendants alleged that Russia was a "corrupt system run by crony capitalists" during the 1990s, and thus lacked the requisite level of "openness and reliability" for application of the privilege.

'The Very Centerpiece of the Public Controversy'

Although the plaintiffs contested their public figure status throughout the litigation, in opposing summary judgment they argued that the court "need not reach the public figure issue" because they could meet the heightened "actual malice" burden of proof imposed by the First Amendment upon public figure defamation plaintiffs.

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Federal Court Dismisses Defamation Action Brought by Russian Oligarchs

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The defendants argued that the court should decide the constitutional status of the plaintiffs as a threshold matter determinative of the standard of fault, and maintained that the plaintiffs were limited-purpose public figures for at least two controversies: a broad public controversy "involving corruption in post-Soviet Russia and the future of Western aid and investment to the county" and a narrower sub-controversy involving Tyumen's battle with BP Amoco over ownership of Russian oil assets.

Judge Bates found Aven and Fridman to be public figures under the broader analysis, never reaching the narrower controversy. Indeed, he concluded that the oligarchs were "two of the leading participants in the transformation of the Russian economy," which was "one of the defining foreign policy controversies of the 1990s." As such, they wielded "unprecedented influence in the political and economic affairs of their nation" and stood as "the very centerpiece of the public controversy in this case."

The court further held that Aven and Fridman satisfied each of the guideposts for limited purpose public figures articulated by *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). The plaintiffs "have chosen paths of endeavor that 'invite attention and comment'" and "are among the richest and most influential businesspeople in Russia, if not the world."

The thousands of English-language articles about them represent a "media footprint … far greater than those found sufficient to support public figure status in other cases." By writing numerous articles, employing large inhouse press departments and hiring outside public relations firms, the plaintiffs "enjoy 'access to the channels of effective communication.'" Finally, the oligarchs "have used their positions to influence the events of their country and the world, and have assumed a prominent role in the civic life of Russia, associating closely and openly with the Russian business elite and politicians at the highest positions of government."

The court summarily rejected the plaintiff's two primary arguments that they were private figures. First, Judge Bates decided that an argument that the plaintiffs' fame was limited to Russia was inconsistent with the facts and, in any case, relevant only to a general public figure analysis.

Rather, Aven and Fridman "are players on the world stage" and therefore "limited public figures not only in Russia, but in the United States as well." The court similarly rejected the plaintiffs' argument that the controversy over Russian corruption and foreign aid was too broad a controversy under First Amendment precedent, citing to numerous decisions where the D.C. Circuit and other federal courts recognized analogous controversies, such as "the state of the oil industry." *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (en banc).

The Corporate Plaintiffs

Turning to Alfa Bank and Alfa Eco, the court followed the precedent of *Martin Marietta Corp. v. Evening Star Newspaper Co.,* 417 F. Supp. 947 (D.D.C. 1976), and *Metastorm, Inc. v. Gartner Group, Inc.*, 28 F. Supp. 2d 665 (D.D.C. 1998), in holding that corporations are public figures in defamation actions under D.C. law, because the dignitary interests justifying reduced speech protections about private *individuals* are not present when discussing matters of legitimate public interest involving *companies*.

Even were this not the rule in D.C., the court indicated that the corporate plaintiffs "would nonetheless be public figures for the same reason as Aven and Fridman" – their media profile and active participation in public controversies.

No Evidence of Actual Malice

Turning to the question of fault, the court noted that "plaintiffs have not come forward with any direct evidence of actual malice." Rather, the plaintiffs sought to present circumstantial evidence, relying heavily on their journalism expert, Professor Joel Kaplan, quoting him over 30 times in their opposition to summary judgment and block quoting more than 100 lines of his report. In response, the court noted that "[c]ourts and commentators generally have not permitted plaintiffs to prove ac-

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Federal Court Dismisses Defamation Action Brought by Russian Oligarchs

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tual malice through expert testimony," and decided that "reliance on expert opinion as to the defendant's departure from journalism ethics and the 'standards of investigation' is unhelpful here in light of the settled law closing the door on such evidence for the actual malice inquiry."

The court noted that circumstantial evidence could show actual malice only where a story "(i) was 'fabricated' or the product of the defendants' imagination; (ii) is 'so inherently improbable that only a reckless man would have put [it] in circulation'; or (iii) is 'based wholly on a source that the defendant had obvious reasons to doubt, such as an unverified anonymous telephone call,'" quoting *McFarlane v. Sheridan Square* Press, 91 F.3d 1501(D.C. Cir. 1996).

The plaintiffs did not claim that the allegations were fabricated, and the court readily concluded that none of the allegations were inherently improbable when "the Director of the FBI estimated in testimony before Congress that the Russian mafia had taken control of more than 70% of all Russian commercial enterprises and that most of the 2,000 banks in Russia were 'controlled by organized crime.'" Finally, the court concluded that there were no obvious reasons to doubt the story: "Defendants grounded their article on several intelligence sources, corroborating documents, and a wealth of reports in the United States and Russian media."

The court gave a nod to the plaintiffs' complaints, noting that the truth of specific allegations "might never be known" and that "defendants' actions are not above reproach." Particularly, CPI "likely should have researched certain points more carefully before leveling allegations as serious as drug trafficking and organized crime connections against plaintiffs." Nevertheless, the court did recognize that "[a] plaintiff will always be able to point to ways in which the defendant could have pursued another lead, or sought another piece of corroborating evidence. Here, the failure to pursue this additional information does not evince a willful blindness to competing evidence, but only a desire to put to a close the investigation of a story."

None of the allegations were inherently improbable when "the Director of the FBI estimated in testimony before Congress that the Russian mafia had taken control of more than 70% of all Russian commercial enterprises…"

Conclusion

As the *MediaLawLetter* went to press, it was unclear whether the plaintiffs will appeal or whether five years of litigation is nearing an end. But if this decision serves as the last word in the case, Judge Bates offers fitting ones in closing: "Serving as the target of criticism – sometimes false – is the burden that our system of laws quite consciously places on the shoulders of public figures. … Plaintiffs no doubt have the wherewithal to respond to erroneous publications through persuasion rather than litigation. The First Amendment demands that they pursue that path."

Defendants were represented by Michael D. Sullivan, Elizabeth C. Koch, Celeste Phillips, and Chad R. Bowman, all of Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. The plaintiffs were represented by Daniel Joseph, Jonathan S. Spaeth, Tobias Zimmerman, and Jeremy A. Paris, all of Akin, Gump, Strauss, Hauer & Feld, L.L.P., in Washington, D.C.

MLRC Defense Counsel Section Breakfast Meeting

Friday, November 11th
7:00 am
Proskauer Rose Conference Center
1585 Broadway, 26th Floor

RSVP Required
Please contact Kelly Chew at
kchew@medialaw.org for more information

Kentucky Federal Court Rules Sufficiency of Newspaper's Correction Is A Jury Question

By Jon Fleischaker

On September 26, 2005, the United States District Court for the Western District of Kentucky denied a local newspaper's motion to dismiss a libel plaintiff's punitive damages demand. *Dr. Philip C. Trover v. Dr. Neil J. Kluger and Paxton Media Group LLC*, No. 4-05-CV-014, 2005 WL 2372043 (W.D.Ky.) (Heyburn II, J.).

The motion was based on a Kentucky statute that prohibits punitive damages if a correction has been published.

Background

The lawsuit was filed by former Madisonville, Kentucky radiologist Philip C. Trover against Paxton Media Group LLC, the publisher of the *Madisonville Messenger* newspaper. Trover's claims concerns six separate articles published in March and April of 2004 in connection with an investigation by the Center for Medicare and Medicaid Services into allegations concerning quality assurance measures at the local hospital's radiology department.

Trover worked for the Trover Clinic, named for his father. After the investigation, the Clinic terminated its relationship with Trover. Trover's Kentucky medical license was also subjected to an emergency order of suspension, which is still in effect.

In January 2005, Trover's attorney sent a lengthy letter to *The Messenger* detailing his contentions that various statements in the six articles were false. Although *The Messenger* maintained that its reporting was accurate, it printed the attorney's letter in full the next day.

Kentucky law, KRS 411.051, provides that punitive damage awards in defamation actions against media defendants are only available where the news organization fails to provide a correction at the plaintiff's request. Neither fault nor falsity must be admitted, and the correction may simply be a fair version of the plaintiff's statement of facts.

However, the correction must also be printed in "substantially as conspicuous a manner as the statement or statements specified as false and defamatory." The statute has been on the books since 1964, but there are no reported decisions of Kentucky's appellate courts interpreting or applying the law.

District Court Decision

Paxton Media Group moved the court to dismiss Trover's claim for punitive damages based upon *The Messenger*'s verbatim publication of Trover's statement of facts. The court held that the publication was fair and impartial as a matter of law but ruled that the question of its conspicuousness was premature. The publication of Trover's letter began on the bottom of the front page of *The Messenger* and was continued to two additional full pages. Several of the six articles had appeared on page one above the fold under large headlines.

A reasonable factfinder could conclude that the correction was not substantially as conspicuous as some of the articles.

The court reasoned that one correction for six articles was sufficient because Trover only demanded a correction once. However, the court believed that a reasonable factfinder could conclude that the correction was not substantially as conspicuous as some of the articles and, therefore, the question must be presented to a jury. If the jury finds that the correction was sufficiently conspicuous it will be precluded from awarding punitive damages. Trover has asked for $70 million in punitive damages.

Jon Fleischaker and Jeremy Rogers of Dinsmore & Shohl LLP in Louisville, Kentucky represent Paxton Media Group in this matter. Frank Stainback, Jr., Sullivan, Mountjoy, Stainback & Miller, P.S.C., Owensboro, KY, represents Plaintiff.

Planning Session
2006 NAA/NAB/MLRC CONFERENCE

Please RSVP to kchew@medialaw.org
Thursday, November 10th at 12:30-1:30 p.m.
at the offices of Davis Wright Tremaine
1633 Broadway, Suite 2700

Richard Grasso's Libel Claim Against NYSE Reinstated

At the end of September, a New York appellate court reinstated a libel claim by former New York Stock Exchange Chairman Richard Grasso against the Exchange and its current Chairman, John S. Reed. *Grasso v. The New York Stock Exchange, Inc., et al.*, No. 401620/04 (NY App. Div. Sept. 29, 2005) (Mazzarelli, J.P., Friedman, Nardelli, Sweeny, JJ.).

The court held that the statements at issue were not protected opinion since they implied undisclosed facts.

Background

The libel claim is part of a suit between the parties over Grasso's compensation from the Exchange. There was a public uproar in 2003 after it was revealed that the Exchange's compensation committee, consisting mainly of representatives from companies regulated by the Exchange, had given Grasso a compensation package in excess of $140 million. Grasso resigned shortly after the disclosure.

The NYSE sued Grasso to recover portions of the compensation. Grasso counterclaimed for unpaid portions of his salary and sued for libel for statements made about him to the public and the press. The New York State Attorney General has also sued Grasso, alleging that the pay package violated the state's non-profit corporations law.

The first statement at issue was a remark by Reed, quoted in the December 21, 2003 *New York Times*, to the effect that, if a person "trained in the law" were to read the Exchange's internal report (the Webb report) on the matter, he or she "would say that there is information in that report that would support a potential legal action."

The second statement at issue was a January 8, 2004 NYSE press release stating that Reed had informed the SEC and the New York Attorney General that the NYSE Board "had reviewed and discussed the [Webb] report, concluding that 'serious damage has been inflicted on the Exchange by unreasonable compensation of the previous Chairman and CEO, and by failure of governance and fiduciary responsibility that led to the compensation excesses as well as other injuries.'"

In March 2005, the trial court granted defendants motion to dismiss for failure to state a cause of action, ruling that the statements were expressions of opinion.

Statements Implied Undisclosed Facts

In a typically brief New York appellate division decision, the court ruled that although the statements expressed the opinions of the NYSE on its potential claims against Grasso, a reasonable reader could understand the statements to imply undisclosed defamatory facts. Since the statements are susceptible of a defamatory meaning, the court ruled that meaning – and whether the statements were "of and concerning" Grasso – are questions for the trier of fact to decide.

Finally, the court noted that Grasso had conceded that he is a public figure for purposes of the libel claim and that he sufficiently pleaded actual malice to withstand a motion to dismiss.

Richard Grasso is represented by Gerson Zweifach, Williams & Connolly LLP, Washington, DC. The NYSE and its current chairman are represented by Linda Coberly, Winston & Strawn LLP, Chicago, IL.

Buffalo News Wins Summary Judgment

Strong Headline Makes for Strong Headline Law

By Joseph Finnerty

Having been declared a public figure on a 2003 defense motion, a plaintiff decided to abandon all his claims except as to the headline of one of two publications at issue and lost his case this month on a defense motion for summary judgment. *Lawrence E. White v. Berkshire Hathaway, Inc. and Henry L. Davis*, Index No. 1995/3771 (Erie County Oct. 4,2005). *See MediaLawLetter* April 2003 at 23.

Background

Lawrence E. White sued on a 1994 article, headlined "Unscrupulous operation gouges nursing home," and an editorial headlined "Profiting from the poor/nursing home situation was unconscionable." *The Buffalo News* published the article on the Local front page of its May 22, 1994 Sunday edition. The editorial ran several days later.

In partnership with his mother, Mr. White was the operator of the nursing home, Hamlin Terrace Health Care Center. The article reported on conditions at Hamlin Terrace during the period Mr. White operated it, the eventual appointment of a receiver, and the bankruptcy of the affiliated group that built the home using a HUD-insured loan. It also discussed findings of HUD auditors that questioned Hamlin Terrace's financial operations.

In addition, the article recounted (from *Buffalo News* and *Buffalo Courier-Express* reports in 1978-80) Mr. White's controversial history as a developer and his questionable use of public funds in his projects.

Though there had been essentially no publications about Mr. White in the intervening fourteen years, the court granted defendants' motion that, as a result of the prior coverage, he had become and remained a limited purpose public figure for these controversies. 195 Misc. 2d 605, 759 N.Y.S.2d 638 (Sup.Ct. Erie Co. 2003), *aff'd* 5 A. D.3d 1083, 773 N.Y.S.2d 664 (4th Dep't 2004).

Although Mr. White sued on both the article and editorial and specified about a dozen statements he claimed were false and defamatory in both, as trial approached he announced his determination to abandon all these claims and to focus solely on the article headline.

Summary Judgment for Newspaper

In moving for summary judgment, the defendants (in addition to asserting defenses based on truth, privilege and fault) argued that, as long as the headline "fairly indicated" the gist of its article, it could not be separately actionable and that such a "fair index" headline could only be considered in context with the article.

Under the "fair index" analysis, defendants claimed, even if a headline were unclear, erroneous or even false, these deficiencies would be effectively clarified, ameliorated and corrected – and rendered non-actionable – by virtue of the correct reportage contained within the article.

Additionally, the defendants asserted that a headline, such as this one, that did not specifically name the plaintiff was not "of and concerning" him and, for this reason as well, could not be separately actionable.

The trial court judge, Hon. John P. Lane (who also decided the preceding public figure motion), agreed. Finding that the "threshold question" of whether the headline was a "fair index of the article with which it appears" is "one of law for the court, not a question of fact for a jury," the Judge stated that such a "fair index" headline "is not actionable as a matter of law."

Distinguishing a case relied on by the plaintiff in which a recovery was had solely on the basis of a headline, *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 426 N.Y.S.2d 274 (2d Dep't) 1980), the Judge, adopting the defense analysis, stating:

> It is significant that plaintiff was not named in the headline at issue. Unlike *Schermerhorn* where a racial slur was attributed directly to that plaintiff's speech, the headline here fails not only to specifically refer to plaintiff by name, it omits a reference to any person whatsoever. Instead, it speaks to an "operation" rather than an "operator." A headline that does not directly name the plaintiff is not independently actionable.…

(Continued on page 38)

Buffalo News Wins Summary Judgment

(Continued from page 37)

The court went on to reject the plaintiff's specific assertions regarding the words selected for the headline and relied on principles cited by the defense to dispose of the case:

> Plaintiff takes particular issue with the words "unscrupulous" and "gouges." While these words are a far cry from flattery, they are supported by findings contained in HUD's Inspector General's investigation reported in the news article. These words are not shockingly offensive in today's society nor were they in 1994.... Furthermore, they are not as inflammatory as words referring to someone as "Public Enemy Number One", a label deemed not actionable in [another case cited by the defense]. Finally, the court takes judicial notice of a customary journalistic practice calling for the use of a verb to command the reader's attention to a news article. Although the verb "gouges" is a strong one, it does not rise to the level of actionable malice in the context of this case....

In a testament to judicious, if muscular, copy editing, the factual evidence on the motion showed that the rim editor initially proposed this headline: "Unscrupulous *operator* gouges nursing home." (Emphasis added.)

But the slot and rim conferred with each other, and later with the news editor, and they agreed that a noun change to "operation" would more accurately reflect the content of the story which, while it reported that government investigators concluded Mr. White was really the controlling figure, included additional entities that were involved with the misused funds and patient-care deficiencies.

Joseph M. Finnerty and Karim A. Abdulla of Stenger & Finnerty in Buffalo represented The Buffalo News in this matter. Richard T. Sullivan, of Harris Beach LLP, represented the plaintiff.

North Carolina Newspaper Not Subject To Personal Jurisdiction in Texas

By Bill Ogden

A federal court in Houston has granted a North Carolina newspaper's motion to dismiss a libel complaint brought by a Texas resident. *Anwar Ouazzani-Chahdi v. Greensboro News & Record, Inc.*, No. H-05-1898, 2005 WL 2372178 (S.D. Tex. Sept. 27, 2005) (Ellison, J.). The decision holds that the mere posting of a news article on a passive website, together with the presence of three mail subscriptions in Texas, is insufficient to confer personal jurisdiction.

Background

The libel complaint concerned an April 25, 2004 article entitled "Fake-Marriage Schemes Commonplace," published in the *Greensboro News & Record*, a daily newspaper of general circulation based in Greensboro, North Carolina.

The article surveyed five North Carolina divorce cases in which one spouse alleged that the marriage was a sham entered into for the sole purpose of allowing the other spouse to obtain United States citizenship. One of the divorce cases mentioned in the article was the case of Mr. Chahdi. The article quotes Mr. Chahdi's ex-wife's divorce complaint, in which she referred to her marriage as a sham, and included a comment to the same effect from her lawyer.

After remarrying and moving to Houston, Mr. Chahdi sued the *Greensboro News & Record* in Texas state court, claiming defamation, negligence and gross negligence. The plaintiff claimed he first learned of the *Greensboro News & Record* article when he "googled" his name on the Internet, revealing the web version of the article on the newspaper's website. The *Greensboro News & Record* removed the suit to federal court in the Southern District of Texas, and moved to dismiss based on lack of personal jurisdiction.

No Personal Jurisdiction

In a memorandum opinion by U.S. District Judge Keith Ellison, the Court dismissed the libel complaint based on lack of personal jurisdiction. Citing to the newspaper's affidavits, the Court noted that the *Greensboro News & Record* had only three mail subscriptions in the State of Texas, and that 99% of its circulation of 95,600 daily copies is within North Carolina.

The *Greensboro News & Record* had no employees or assets in Texas, did not transact business in Texas, and paid no state or local sales or property taxes within the State of Texas. The Court relied in part on the Fifth Circuit's recent decision in *Fielding v. Hubert Burda Media, Inc.*, 413 F.3d 419 (5th Cir. 2005), which found the distribution of 70 copies in Texas out of a weekly circulation of 750,000 copies was insufficient to establish general jurisdiction in a libel complaint brought by a Texas resident against a German magazine.

Judge Ellison likewise rejected the plaintiff's assertion that posting the article on the newspaper's website was sufficient to confer general jurisdiction. Citing R*evell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), Judge Ellison found that the *Greensboro News & Record* website was a "passive," which did nothing more than allow the newspaper to advertise and post articles on the Internet.

The Court next found that Mr. Chahdi had failed to establish specific jurisdiction over the *Greensboro News & Record*. Citing again to *Fielding*, 413 F.3d at 425, Judge Ellison noted specific jurisdiction in a libel case may be based either upon (1) adequate circulation by a publisher in the forum state, or (2) publication of a story that is targeted at the forum state, "knowing that the effects of the story will be felt there." As a matter of law, three mail subscriptions out of an average circulation of 95,600 was insufficient to show adequate circulation in Texas. Given that the article dealt entirely with five North Carolina divorce cases, utilizing no Texas sources, no newsgathering in Texas, and no mention of Texas at all, the Court found that the newspaper lacked knowledge or intent to target the State of Texas.

The plaintiff, who proceeded pro se, has filed a notice of appeal to the Fifth Circuit.

Bill Ogden and Keith Lorenze of Ogden, Gibson, White, Broocks & Longoria, L.L.P. in Houston, Texas represented The Greensboro News & Record, Inc.

Complaints About Treatment of Disabled Man Not Covered by Georgia Anti-SLAPP Law

In a recent decision, the Georgia Court of Appeals reinstated a libel complaint against a woman who protested the treatment of her mentally retarded son. *Georgia Community Support & Solutions, Inc. v. Berryhill*, No. A05A1121, 2005 WL 1798403 (Ga. App. Aug. 1, 2005) (Phipps, Andrews, Mikell, JJ.).

At issue was an e-mail sent by the defendant, Shirley Berryhill, to about 40 people, including one who worked for the Atlanta Journal-Constitution and one who worked for the Georgia Department of Human Resources. In the email, defendant complained that the plaintiff, Georgia Community Support & Solutions ("GCSS"), a non-profit care organization that assists disabled adults, had placed her son with a home caregiver but had not told her where he was, that it had taken her two and a half months to find him; and that when she eventually located him, she learned that he had been kept in a backyard shed and beaten. Berryhill also posted the e-mail to a website for families of disabled adults.

The trial court had dismissed the complaint under Georgia's anti-SLAPP statute, OCGA § 9-11-11.1, holding that defendant's statements were privileged and that plaintiff had sued to prevent defendant "from bringing the plight of her son under the care of GCSS to the attention of the media, the government and the public at large."

Court of Appeal Reverses

The Court of Appeal held that while the safety and care of disabled adults is a matter of public concern "the anti-SLAPP statute does not encompass all statements that touch upon matters of public concern." Rather, the court concluded, "the statute's application is limited to statements made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any ... statement ... made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

The Court found no evidence that any official proceeding was involved or that defendant sought to specifically initiate an official proceeding by making the statements.

The defendant had also argued on appeal that her statements were protected opinion and made without actual malice, but the Court of Appeal did not reach these defenses, noting instead that they could be addressed on a motion for summary judgment.

Plaintiff is represented by Richard Witterman, The Witterman Law Firm, P.C.; defendant, by Torin Togut, in Lawrenceville, GA.

Suspended Sentence in New Mexico Criminal Libel Case

A New Mexico man convicted of criminal libel was given a 360-day suspended sentence and ordered to pay $114 in court costs, perform 50 hours of community service, and attend a life-skills class. *State v. Mata*, No. M-47-MR-200500028 (N.M. Mag. Ct., Farmington sentencing Oct. 19, 2005).

Juan Mata was charged with criminal libel after he picketed Farmington, N.M. police headquarters, claiming that he was being harassed by an officer with the department. His case was the first time that such charges were brought in the state since 1998, and the first such prosecution to proceed to trial since 1992. New Mexico's criminal libel provision, N.M. Stat. § 30-11-1, dates from 1889 and was reauthorized in 1963. *See* "Criminalizing Speech About Reputation," 2003 MLRC BULLETIN No. 1 , at 89.

After a one-day trial in August, Mata was found guilty of criminal libel, harassment and stalking, all misdemeanors punishable by up to one year imprisonment and/or a fine of up to $1,000. *See* N.M. Stat. § 31-19-1.

At the sentencing hearing, Assistant City Attorney William Cooke, acting as special prosecutor, requested a conditional discharge of the case. Mata's lawyer, Dennis Montoya, urged Magistrate William Vincent to vacate the guilty verdict, saying that "[t]here was no legitimate prosecutorial purpose for these charges against Mata."

In 1992, the New Mexico Court of Appeals found the statute to be unconstitutional as applied to statements on a matter of public concern, because it did not require a finding of actual malice. *State v. Powell*, 114 N.M. 395, 839 P.2d 139, 20 Media L. Rep. 1841 (N.M. Ct. App. 1992).

Pennsylvania Court Affirms Dismissal of Judge's Libel Suit Against TV Station

By Michael Rothberg and Brent Olson

A Superior Court of Pennsylvania recently affirmed a trial court ruling awarding summary judgment to Pittsburgh television WPXI and several of its employees ("WPXI") in a defamation action brought by a local judge, holding the station's thorough investigation and balanced broadcast precluded a finding of actual malice. *Manning v. WPXI, Inc.*, 2005 PA Super. 343 (Oct. 11, 2005) (Bender, Panella, Johnson, JJ.).

Background

The chain of events that ultimately culminated in the defamation suit began on December 20, 1995 at the Pittsburgh International Airport. Plaintiff Jeffrey A. Manning, a judge in the Allegheny County Court of Common Pleas, requested that x-ray operator Ursula Riggins use extra care in handling his son's garment bag, which Manning believed was prone to tearing.

Riggins sent the garment bag through the x-ray machine, and it tore. According to Riggins, who is African-American, and several of her co-workers, Manning confronted her about the tear in the garment bag and, in the process, used a racial epithet.

Shortly thereafter, WPXI received three anonymous tips and a message from Riggins about the incident. Scott Newman, an investigative producer at WPXI, contacted Riggins, who told Newman that Manning had used a racial epithet during the incident.

Newman initiated a thorough investigation lasting approximately one month, during which he, among other things, re-interviewed Riggins, and interviewed five of Riggins' co-workers who witnessed the incident, the first police officer on the scene, and Manning's attorney.

Newman also reviewed reports submitted by Riggins and her co-workers to their supervisors, as well as a police report, which did not attribute any slurs to Manning.

WPXI broadcast its report on the incident in February, 1996. The report contained footage of Riggins and her co-workers accusing Manning of using a racial epithet. However, the report also repeatedly stated that Manning, through his counsel, denied using the slur, and noted the police report did not attribute any slurs to Manning.

In 1997, Manning brought a defamation action against WPXI. After discovery, WPXI moved for summary judgment, arguing that Manning failed to demonstrate evidence of actual malice. The trial court granted the motion and Manning appealed.

Appeals Court Decision

Manning argued on appeal that several factors supported his contention that WPXI acted with reckless disregard for the truth.

For example, Manning claimed that WPXI should have doubted the veracity of Riggins' allegations because only the latter of the two reports she submitted to her employer contained the allegation that Manning used a racial epithet.

Similarly, Manning argued that the police report, which did not contain any reference to racial epithets, should have raised serious doubts as to the truthfulness of the allegations.

Manning also relied heavily on certain statements that the reporter allegedly made to Manning's counsel, including: "I don't care what the truth is. I'm running the story my way."

The appellate court ruled that the thoroughness of the investigation and the balanced nature of the report precluded a finding of actual malice. The court also noted that there was nothing inconsistent about the two reports submitted by Riggins to her employer, and that, likewise, there was nothing in the police report inconsistent with the allegation that Manning used a racial epithet.

It also held that, even if Newman made the alleged remarks to Manning's counsel that were attributed to him, that would not outweigh the content of what was broadcast, which was balanced and fair to Manning.

Michael Rothberg is a partner, and Brent Olson an associate, at Dow, Lohnes & Albertson, PLLC in Washington, D.C. Plaintiff was represented by John E. Quinn of Evans, Portnoy & Quinn. Defendants were represented by Walter DeForest, Jacqueline A. Koscelnik, George E. Yokitis, Mindy J. Shreve and David J. Berardinelli of Deforest Koscelnik Yokitis & Kaplan.

Florida Editor, City Settle Arrest Lawsuit

Settlement Comes After State Statute Was Held Unconstitutional

After the U.S. Court of Appeals for the Eleventh Circuit held the statute under which he was arrested unconstitutional and ordered a trial on damages, the publisher of a local weekly newspaper in Key West, Fla. settled his suit against the city for $240,000.

Dennis Reeves Cooper, editor of the free weekly *Key West The Newspaper,* filed his §1983 action against then-Key West police chief Buz Dillon after he was arrested for publishing articles discussing a complaint that he had filed with the Florida Department of Law Enforcement against a Key West internal affairs officer. The complaint alleged that the Internal affairs officer had failed to investigate whether a member of the Key West police force lied in a traffic court proceeding.

Cooper was charged under Fla. Stat. § 112.533(4), which made disclosure of any information from an internal police investigation, including disclosure by the complainant, a first degree misdemeanor.

Cooper surrendered to police and spent three hours in jail, although the prosecution was dropped. The initial ruling in Cooper's civil rights case, by U.S. Magistrate Judge John J. O'Sullivan, held that the statute was "an 'outright, direct ban on speech'" for which there was no compelling state interest. But District Court Judge Lawrence J. King upheld the provision and granted summary judgment to defendant. *Cooper v. Dillon*, Civil No. 01-10119 (S.D. Fla. order Feb. 6, 2004); *see also MLRC MediaLawLetter* Feb. 2004 at 59.

In March 2005, the Eleventh Circuit reversed, rejecting the district court's finding that the statute was a content-neutral time, place and manner restriction on speech. Instead, the court ruled that the statute was unconstitutional. 403 F.3d 1208, 33 Media L. Rep. 1577.

The Eleventh Circuit held that the defendant enjoyed qualified immunity individually, but could be held liable in his official capacity and remanded for a trial on damages. The defendants motion for rehearing was denied and the district court scheduled a trial on damages in December. The parties then entered into settlement talks.

The settlement, which will be paid entirely by the city's insurer, was approved by the Key West City Commission on Oct. 18. Most of the settlement amount, $200,000, will go to Cooper's attorneys.

The plaintiff was represented by Randall C. Marshall of the ACLU of Florida, based in Miami; M. David Gelfand, a professor at Tulane Law School in New Orleans, La.; and Thomas W. Milliner of New Orleans, La. The defendant was represented by Michael T. Burke of Johnson, Anselmo, Murdoch, Burke, Piper & McDuff in Fort Lauderdale.

New York Court Refuses to Enforce French Judgment

Enforcement Would Be Incompatible with First Amendment

By Michael T. Holland

Dismissing an action to enforce a French money judgment for unauthorized use of intellectual property and unfair competition brought by French clothing designers against a Delaware company, Judge Gerard Lynch of the Southern District of New York wrote, "like Magritte's famous painting of a pipe, one of defendant's photos *n'est pas une robe* – it's merely a *picture* of a dress." *Sarl Louis Feraud Int'l v. Viewfinder, Inc*., No. 04 Civ.9760, 9761, 2005 WL 2420525 n.10 (S.D.N.Y. Sept. 29, 2005) (emphasis in original).

But, Judge Lynch in fact decreed that the judgment issued by the Tribunal de Grande Instance de Paris *n'est pas un jugement*, holding that "the French judgment is incompatible with the First Amendment [and] . . . to enforce it would therefore be repugnant to the public policy of this State."

Background

The defendant, Viewfinder, maintains websites on which it posts information about fashion industry events and photographs from fashion shows. In January 2001, in response to Viewfinder posting photographs of models wearing clothing of plaintiffs' design at various fashion shows, the plaintiffs brought an action in French court seeking damages for unauthorized use of intellectual property and unfair competition.

Despite being properly served by the United States Marshal in accordance with the Hague Convention, Viewfinder failed to answer the complaint or to appear before the French court. As a result, the French court entered a default judgment in favor of the plaintiffs and awarded damages of 1,000,000 francs ($183,007.42), plus costs of the action, and an additional fine of 50,000 francs per day for each day that Viewfinder failed to comply with the judgment.

The French court later eliminated the fine from the judgment. Following the dismissal of Viewfinder's untimely appeal to the Cour d'Appel de Paris, the plaintiffs brought this action to enforce the French judgment.

District Court Decision

Viewfinder argued against enforcement of the French court's damage award on the grounds that the award

(1) was excessive and not reasonably related to the plaintiffs' actual damages,
(2) was void because of the incongruence of French and American intellectual property law, and
(3) violated the First Amendment.

The court quickly dispatched the first ground advanced by Viewfinder, stating that, "This Court will not second-guess the French court's analysis of the record before it to determine whether the court has properly applied its own principle." Moreover, the court cautioned that "it is important to recall that Viewfinder *defaulted* in the French proceeding . . . [thus failing] to avail itself of the opportunity to contest damages."

Viewfinder's second argument proved equally unpersuasive. Viewfinder contended that because the intellectual property at issue – the dress designs created by the plaintiffs – could not be copyrighted under U.S. law, no such rights could be infringed.

However, the court clarified that "the issue here is not whether the actions alleged against [Viewfinder] in France violate American law; rather, it is whether the judgment of the French court imposing liability under French law is repugnant to the public policy of the State of New York."

Under the applicable New York statute, only foreign judgments that are "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought" will be vacated. Differences between French and American intellectual property law did not rise to this level.

Relying on *Bachchan* and *Telnikoff*, among other cases, however, the court found that violations of the First Amendment, not the French court's application of a different intellectual property regime, were repugnant to New York public policy.

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New York Court Refuses to Enforce French Judgment

(Continued from page 43)

Indeed the court concluded that, "there is no question that Viewfinder's activities fall within the purview of the First Amendment." The photographs at issue were taken at fashion shows open to the public and extensively covered by the media. As part of that media coverage, Viewfinder posted photographs from the shows and information, albeit condensed, about the designers and their collections.

The court rejected plaintiffs' contention that Viewfinder's photographs lacked "sufficient communicative elements to bring the First Amendment into play" because the website provided "virtually no news or information." As the court noted:

> "A picture, as the cliché would have it, is worth a thousand words, and the defendant's decision to forgo an effort to describe the designers' creations verbally in favor of a more efficient visual presentation does not defeat protection. The nature of the designers' work is the 'news or information' to be conveyed, and the photographic medium is the ideal way to convey it."

Additionally, the court suggested, the First Amendment is not circumvented by the charge that Viewfinder copied the plaintiffs' dresses. As the court's reference to Magritte's famous painting made clear, "Viewfinder has not *copied* plaintiffs' dresses; it has displayed a particular depiction of them," and such a display enjoys First Amendment protection.

"American courts," Judge Lynch affirmed, "have recognized that foreign judgments that run afoul of First Amendment values are inconsistent with *our notions of what is fair and just, and conflict with the strong public policy of our State.*" (emphasis in original). Therefore, the court found the judgment of the French court unenforceable, and the plaintiffs' action was dismissed.

Michael T. Holland is an associate in the Austin office of Vinson & Elkins L.L.P. Viewfinder, Inc., was represented by Steven J. Hyman and Paul H. Levinson of McLaughlin & Stern, L.L.P., in New York. Sarl Louis Feraud International and S.A. Pierre Balmain were represented by James P. Duffy, III of Berg and Duffy, L.L.P., in New York.

House of Lords Rejects Appeal Over Costs in Naomi Campbell Case

Success Fee System Not a Violation of Article 10

On October 20, the House of Lords, in a unanimous decision, dismissed a petition by MGN, publisher of the *Daily Mirror* newspaper, challenging, on Article 10 grounds, the legal costs scheme under which it faces a bill of over $1,000,000 as the losing party in model Naomi Campbell's breach of confidence case in which she was awarded only $6,000 in damages. *Campbell v. MGN Limited* [2005] UKHL 61. *See MLRC MediaLawLetter* May 2004 at 39.

MGN was challenging a portion of England's Access to Justice Act of 1999 which allows counsel retained under "conditional fee arrangements" ("CFA") – the rough equivalent of the U.S. contingency fee system – to charge a "success rate" of up to double ordinary rates.

The House of Lords noted that the system could undoubtedly cause hardships to the press by encouraging self-censorship over fear of high legal costs. Lord Justice Hoffmann described this as the "blackmailing effect." But the Court concluded that the scheme was a legislative policy decision "which the courts must accept."

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The policy behind the scheme is to make losing defendants "contribute to the funds which would enable lawyers to take on other cases which might not be successful but would provide access to justice for people who could not otherwise have afforded to sue." ¶ 16.

Background

Campbell sued MGN in 2001 for breach of confidence after the *Mirror* published photographs of her leaving a meeting of Narcotics Anonymous ("NA"). The photographs were published under the headline "Naomi: I am a drug addict" and reported that she was attending NA meetings for her addiction problem. Campbell had publicly denied having a drug abuse problem.

She was awarded £3,500 by the trial court. The Court of Appeal reversed and dismissed the claim. Last year the House of Lords granted Campbell's appeal and reinstated her award. It held that the publication of the photographs, together with the "details" of her treatment at NA went beyond what was necessary to set the record straight.

Following her success in the House of Lords, her solicitors firm Schillings served three bills for legal costs to the *Mirror* under England's loser pays costs system. £377,070.07 for the trial, £114,755.40 for the Court of Appeal hearing and £594,470.00 for a two-day hearing before the House of Lords.

Campbell had paid her own costs at trial and at the Court of Appeal. But her appeal to the House of Lords was done under a CFA, including a 100% success fee for Schillings.

No Article 10 Violation

The *Mirror* argued that it should not have to pay any part of the success fee, because it was so disproportionate as to infringe its right to freedom of expression under Article 10 of the European Convention of Human Rights. This argument was rejected in deference to the government's policy objectives in enacting the CFA scheme – "access to justice" – imperfect as the scheme is.

MGN also argued that Campbell was capable of funding her own litigation and that it was wrong to allow her and her lawyers to exploit the CFA scheme.

This argument was also rejected by the House of Lords which found that means testing was not part of the CFA scheme nor would it be practical.

The Court did cite with approval "cost-capping" orders at an early stage of litigation to set a reasonable parameter for legal fees for a case. Lord Hoffmann concluded that in the end "it may be that a legislative solution will be needed to comply with Article 10."

MGN will be able to argue that the legal fees are excessive on at a regular costs hearing, albeit not on Article 10 grounds.

At the House of Lords hearing, Naomi Campbell was represented by the solicitors firm Schillings and barrister James Price QC, 5 RB. MGN was represented by solicitors firm Davenport Lyons and barrister Richard Spearman QC.

Ireland's Broadcasting Commission to Develop Program Standards

By Colin Kavanagh

The Broadcasting Commission of Ireland ("BCI") announced on September 7th its intention to develop a code of program standards, which will apply to all radio and television broadcasters licensed in Ireland. The proposed code will generally address the issues of taste and decency in radio and television broadcasting and is expected to be in place by Autumn of 2006.

The BCI has proposed a three stage approach to the code's development to include public consultation, a workshop with broadcasters and a national survey which will capture the views of the public as to what is considered offensive to viewers and listeners in Ireland.

The code will encompass a broad set of principles and rules, which hopefully will provide clarity to broadcasters and audiences and which will acknowledge and cater for the diversity of tastes and interests that exist.

The BCI has produced a consultation document which, as part of the first phase of the project, will be submitted to key groups and interested parties. It addresses issues such as the scope of the code and what factors should be taken into account when assessing program standards. All broadcasters and other stakeholders should consider in detail both the legal and practical implications of such a code and make their views felt.

Commercial Radio Licensing Plan

The BCI announced on the 8th September details of a three year plan for the licensing of additional commercial radio services in Ireland. The proposed services will be based on expressions of interest received earlier this summer.

The BCI, subject to the approval of the Commission for Communications Regulation in Ireland (ComReg) will seek applications for a range of services throughout the country. These include three new national youth services, a quasi-national speech based service, a national Christian service, a classic rock service for Dublin, a multi-city gold service and country and Irish music services for the North East and Mid-West regions.

The commercial radio sector in Ireland has proved to be dynamic, both from a revenue and investor perspective and it is expected that the proposed new services will attract much interest.

Colin Kavanagh is a lawyer with the firm Arthur Cox in Dublin, Ireland.

DID YOU GO TO TRIAL RECENTLY?

If you know of a libel, privacy, or case with related claims that went to trial recently, please let us know. It will be included in our annual report on trials, which is published each year. E-mail your information to erobinson@medialaw.org

District Court Orders Disclosure of Iraqi Prisoner Abuse Photos

In a Freedom of Information Act case brought by the ACLU against the Department of Defense (DOD) and the CIA, a New York federal district court ordered the release of 144 photographs and four movies depicting abuse of prisoners at Abu Ghraib prison in Iraq. *American Civil Liberties Union v. Department of Defense*, 04 Civ. 4151 (AKH), 2005 WL 2397837 (S.D.N.Y. Sep. 29, 2005) (Hellerstein, J.).

The ACLU filed suit in October 2003. On September 15, 2004, Judge Hellerstein ordered the DOD to identify documents in conformance with the ACLU's request. More than a year later, the DOD had still not released some identified photographs and videos, citing privacy and law enforcement exemptions to FOIA.

The DOD argued that releasing them would constitute an unwarranted invasion of the prisoners' personal privacy. In addition, their release would violate the Geneva Conventions' rules protecting prisoner dignity. However, because all identifying characteristics of persons in the photos had been redacted, Judge Hellerstein rejected these arguments.

The government also argued that releasing these photos "is likely to incite violence against our troops." Judge Hellerstein responded, "[o]ur struggle to prevail must be without sacrificing the transparency and accountability of government and military officials....These are the values FOIA was intended to advance, and they are at the very heart of the values for which we fight in Afghanistan and Iraq."

The ACLU had also asked the CIA to confirm or deny that it possessed a Department of Justice memo interpreting the Convention Against Torture (CAT). The CIA refused to admit or deny possession of the CAT memo arguing that do so would require it to admit it had engaged in "clandestine intelligence activities," was interested in doing so, or had the capability of doing so. The district court ordered the CIA to disclose whether it possessed the CAT memo, stating that "acknowledging whether or not the memorandum requested by plaintiffs exists reveals nothing about the agency's practices or concerns."

Special D.C. Circuit Panel Orders Partial Release of Independent Counsel's Report in Cisneros Case

It what appears to be the final coda to a ten-year investigation, a panel of D.C. Circuit judges comprising the "Division for the Purpose of Appointing Independent Counsels" under the now lapsed Independent Counsel Statute, ordered the partial release to the public of the final report into the investigation of Henry Cisneros, the former Secretary of Housing and Urban Development (HUD) in the Clinton Administration. *In Re: Henry G. Cisneros,* No. 95-1, 2005 WL 2722804 (D.C.Cir. Spec. Div. Oct. 24, 2005) (Sentelle, Fay, Reavley, JJ.).

In 1999, Cisneros pled guilty to lying to the FBI during a background clearance check about payments he made to a mistress. A few other private citizens were convicted of lying and tax violations.

David Barrett, the Independent Counsel in the matter, this year filed a motion to release his final report to the public. Federal criminal investigations, such as the Plame investigation, are generally governed by grand jury secrecy rules, *see* Fed.R.Crim.P. 6 (e), that bar public reports on investigation.

The Independent Counsel Statute, however, created a unique reporting requirement. Under 28 U.S.C. § 594(h), the independent counsel shall "file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." The motion was opposed by undisclosed individuals who requested that the report be sealed in whole or part.

Relying on prior decisions regarding independent counsel reports, Judge David Sentelle ruled that the report should be released to the public, except for one section that covered the part of the investigation that did not result in indictments and concerned individuals whose identities were not generally disclosed to the public. *See, e.g., In re North,* 16 F.3d 1234 (D.C. Cir. Spec. Div. 1994); *In re Espy*, 259 F.3d 725 (D.C. Cir. Spec. Div. 2001).

The full report will be released to Congress, because "the continuing expenditure of government funds and resources under the now-lapsed statute is obviously a matter within the responsibility and concern of the Congress."

Allegations of Teacher Misconduct Must Be Made Public

Public Has A Right To Know Unless Allegations Are "Patently False"

By Jessica Goldman

On October 3, 2005, the Washington Court of Appeals ruled under the state Public Disclosure Act that public schools must disclose the names of teachers accused of sexual misconduct unless the accusation of misconduct is patently false. *Bellevue John Does v. Bellevue School District No. 405*, 120 P.3d 616 (Wash. App. 2005) (Becker, Coleman, Agid, JJ.).

Background

The court considered requests by *The Seattle Times* for public records about any teachers accused of sexual misconduct, no matter how the school districts internally resolved or addressed the charges. Teachers whose names were mentioned in public records responsive to *The Seattle Times'* request objected to their identification pursuant to the statute's exemption of: "Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." RCW 42.17.310(1)(b).

Unless the records demonstrate after a sufficient investigation that the allegations are patently false, the public has a legitimate concern with knowing the names of accused teachers so as to protect students and monitor the school districts' performance.

Under the Public Disclosure Act, the right to privacy is invaded "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.17.255.

In analyzing the second prong, Washington courts balance the public interest in disclosure against the public interest in the efficient administration of government. 120 P.3d at 623.

The teachers objected to public disclosure of "letters of direction," used by schools when teacher conduct is inappropriate but not serious enough to warrant other discipline. The court held that such records, and the names of the referenced teachers, are not exempt from disclosure because the contain discussions of specific instances of alleged misconduct and teacher performance which "relate solely to the public, on-duty interactions of students with teachers." *Id*. at 623.

The court noted that the files at issue were not routine performance evaluations, nor did they contain test scores, rankings, or the notes of supervisors regarding the possibility of probation or promotion, and did not refer to sensitive personal information. *Id.*

The court also considered the claimed exemption of records identifying teachers alleged of sexual misconduct where the allegations were determined by the school to be "unsubstantiated" after investigation. The court held that the public does not have a legitimate interest in knowing the identity of a teacher where the accusation of misconduct is patently false and the school has adequately investigated the accusation. *Id.* at 627-28.

However, if the file demonstrates that the accusation is merely "unsubstantiated" but not "patently false," the teacher's identity may not be withheld. *Id*. at 628. The court rejected the claim that disclosure of such records triggers due process protections and requires procedural guarantees of the reliability of the accusation. *Id.* at 630.

In sum, unless the records demonstrate after a sufficient investigation that the allegations are patently false, the public has a legitimate concern with knowing the names of accused teachers so as to protect students and monitor the school districts' performance.

Jessica L. Goldman, Summit Law Group PLLC, Seattle, WA represented a media coalition in this matter. The Seattle Times *was represented by Michele Lynn Earl-Hubbard and Michael John Killeen of Davis Wright Tremaine.*

Update: British Peer's Claim Against U.S. Intelligence Source Barred by Statute of Limitations

A federal district court dismissed on limitations grounds a civil lawsuit brought by Michael Ashcroft, a British businessman and member of the House of Lords, against former Atlanta Drug Enforcement Administration ("DEA") intelligence analyst Jonathan Randel. *Ashcroft v. Randel*, No. 1:03-cv-3645 (N.D. Ga., Sept. 30, 2005) (Story, J.).

Randel had leaked DEA documents mentioning Ashcroft to *The Times* of London, leading to a series of legal actions, including a libel writ in London, a criminal prosecution in Atlanta and this civil lawsuit, alleging the leak violated the Computer Fraud and Abuse Act, as well as Ashcroft's Fourth and Fifth Amendment rights. *See MLRC MediaLawLetter* Jan. 2003 at 3; Dec. 2003 at 34.

Background

The controversy began in the summer of 1999 when *The Times* raised questions about the suitability of Ashcroft, the principal financial backer of England's Conservative Party, to hold the office of party treasurer. Ashcroft is the owner of the Belize Bank, and has substantial business and political interests in that country. *The Times'* reported that Ashcroft and his companies had been referenced in DEA investigations.

Ashcroft immediately sued *The Times* for libel following its reports and through the litigation was able to obtain copies of the DEA documents leaked to the newspaper. The DEA identified Randel as the source.

In December 1999, the libel suit was resolved with the publication on the front page of *The Times* of a statement agreed to by Ashcroft and *The Times'* owner, Rupert Murdoch. The statement noted, *inter alia*, that *The Times* had published details of DEA files in which Ashcroft's name was mentioned but stated further that, "*The Times* is pleased to confirm that it has no evidence that Mr. Ashcroft or any of his companies have ever been suspected of money laundering or drug-related crimes."

Though the statement resolved the libel suit, continued reporting on Ashcroft by *The Times* brought claims of breach and promises of new suits from Ashcroft's lawyers. In one letter to *The Times*, dated May 12, 2000, Ashcroft's counsel, David Hooper, threatened to sue not only *The Times* but Jonathan Randel.

Ashcroft did not immediately sue Randel (or *The Times*). Randel was first prosecuted criminally in federal court in Atlanta. Following his indictment in July 2001, Randel pled guilty in June 2002 and was sentenced to 12 months in prison for conveying records in violation of 18 U.S.C. 641 which prohibits "conversion of government property."

Civil Suit Against Source

In November 2003, two months after he began serving his sentence, Ashcroft filed his civil suit against Randel and sought leave to depose, for purposes of determining damages, representatives of *The Times*. Randel initially failed to formally respond, but following his release from prison he was granted leave to respond and filed a limitations motion.

In response to the motion, Ashcroft argued that his agents' dealings with the DEA and his letter to *The Times* reflected only that he knew Randel to be a suspect in the leak investigation and such knowledge was insufficient to start the limitations clock. Similarly, Ashcroft downplayed the July 2001 indictment as being insufficiently specific to put him on notice that Randel was being indicted for leaking the specific documents used in *The Times'* stories. Ashcroft maintained that the two-year statute of limitations clock did not start until Randel's guilty plea in mid 2002.

The court rejected this argument, holding that, as of the indictment, Ashcroft should have been aware that Randel was the source of the leak. The court noted that Ashcroft knew that the allegedly libelous articles published by *The Times* had been based on leaked documents, that Randel was a suspect in the DEA's investigation into that leak and that Randel had in fact been indicted for leaking the precise kind of documents involved in *The Times* story at the same time as the publication of *The Times* articles.

"In short," the court wrote, "a person with a reasonably prudent regard for his rights, and armed both with the facts in the possession of [Ashcroft] and contained in the indictment, would have known that [Randel] was the cause of his injury."

Lord Ashcroft was represented by Kellogg, Huber, Hansen Todd & Evans, P.L.L.C., Washington, D.C., and Alston & Bird LLP, Atlanta, Georgia. Jonathan Randel was represented by former Georgia Governor Roy E. Barnes and John F. Salter of the Barnes Law Group, Marietta, Georgia.

First Circuit Holds That Temporarily Stored E-mail is Covered By Wiretap Act

In an en banc ruling, the First Circuit Court of Appeals held in August that an employee of an internet service provider (ISP) could be prosecuted under federal wiretap laws for accessing e-mails temporarily stored on the ISP's server. *U.S. v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (en banc) (vacating 373 F.3d 197 (1st Cir. June 29, 2004)).

The court's original panel ruling last year held that the wiretap laws did not apply to the momentary storage involved in the case. It was based on the statute's language and prior decisions holding that while the wiretap laws applied to e-mail messages "in transit," that is, in the course of movement from one computer to another, they did not apply when the messages were "in storage," i.e., stored electronically in a computer's memory or hard drive, even if the storage was temporary while the message was en route from one computer to another. *See MLRC MediaLawLetter*, July 2004, at 35

Facts and First Panel's Ruling

The case involves Bradford Councilman, who was vice president of Interloc, an online book listing service for rare and out-of-print books. The service also acted as an ISP for certain book dealer customers, who obtained e-mail accounts ending in "@interloc.com."

The indictment alleged that Councilman directed Interloc employees to create a computer code that would intercept, copy, and store all electronic communications sent from Amazon.com to Interloc's subscriber dealers. Using that code, Councilman allegedly intercepted thousands of messages, and he and other employees routinely read them for the purpose of gaining competitive advantage.

Critical to the Court's initial decision was the fact that the program operated only on messages at a time when they were contained within the random access memory (RAM) or on hard disks, or both, within Interloc's computer system. Based on that fact, the Court in an opinion by Judge Torruella, and joined by Judge Cyr, dismissed the indictment. It said that because the messages were intercepted during the fraction of a second when they were in "electronic storage" at the ISP, as opposed to "in transit," they "could not be intercepted as a matter of law."

Judge Lipez harshly dissented, writing that the majority's conclusion "would undo decades of practice and precedent regarding the scope of the Wiretap Act and would essentially render the Act irrelevant to the protection of wire and electronic privacy." Judge Lipez found it "inconceivable that Congress could have intended such a result."

Various groups, including the Electronic Frontier Foundation, the Electronic Information Privacy Center and the American Library Association, submitted an amicus brief urging the First Circuit to rehear the decision, arguing that the majority decision gutted privacy protections for Internet communications because it would allow government to obtain the functional equivalent of a wiretap, i.e., accessing briefly stored e-mails, without having to satisfy the standards of the Wiretap Act.

The original decision also led to the introduction of two bills in Congress to change the wiretapping law to include e-mails in temporary storage while en route. *See* H.R.4956 (109th Cong.) (introduced July 22, 2004) and H.R.4977 (109th Cong.) (introduced July 22, 2004).

The full court agreed to rehear the case in October. *U.S. v. Councilman*, 2004 WL 2230823 (1st Cir. Oct. 5, 2004).

En Banc Opinion

In the *en banc* opinion after rehearing, five members of the seven-member panel signed an opinion by Circuit Judge Lipez concluding that "the term 'electronic communication' includes transient electronic storage that is intrinsic to the communication process, and hence that interception of an e-mail message in such storage is an offense under the Wiretap Act."

The court was not persuaded by Councilman's argument that since he could have been indicted under the Stored Communications Act, which clearly applies to communications while in storage, he could not be indicted under the Wiretap Act.

Judges Torruella, and Cyr adhered to their original reasoning. Torruella who wrote that stored communications do not fall within the language of the Wiretap Act. And he also opined that such an interpretation of the act was unforeseeable and that prosecution of Councilman would deprive him of due process.

Lawsuits Challenge Three State Laws Restricting Video Game Expression

By Katherine Fallow and Paul Smith

The week of October 17, 2005, associations representing video game makers and retailers filed suit in the Northern District of California (San Jose Division), challenging the constitutionality of a recently-enacted California law that restricts the dissemination of "violent" video games, and seeking a preliminary injunction against the enforcement of the Act, which is set to go into effect on January 1, 2006.

Background

The California suit is the latest in a series of constitutional challenges to similar laws in Illinois and Michigan that penalize the sale or rental of so-called "violent" video games. All three laws were enacted this year despite the fact that every previous attempt to impose similar government restrictions on video game content has been invalidated by the federal courts under the First Amendment.

Because the new laws are due to become effective by the beginning of next year – and Michigan's law will go into effect even earlier, on December 1, 2005 – decisions in this latest round of legislative targeting of video game expression are expected soon.

The California Act was signed by Governor Schwarzenegger on October 7. The law imposes substantial penalties on those who sell or rent to minors video games meeting the law's definition of "violent" video games. The Act also requires that any game imported into or distributed in California that meets the statutory definition of a "violent" video game be labeled with a large black and white sticker bearing the number "18."

The statutory definition of a "violent" video game is complex, and encompasses those that "appeal to a deviant or morbid interest of minors," and those that enable "the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel or depraved in that it involves torture or serious physical abuse to the victim."

Concerned about the significant burdens placed on the speech of their members and video game consumers, and the law's inherently vague terms, two trade associations – the Entertainment Software Association ("ESA") and the Video Software Dealers Association ("VSDA") – filed suit shortly after the law was signed.

Their lawsuit, *Video Software Dealers Association v. Schwarzenegger*, alleges that the Act violates the First and Fourteenth Amendment by, among other things, imposing content-based restrictions on the dissemination and receipt of protected speech, unconstitutionally compelling government speech through the labeling requirement, and employing a definition to regulate video game expression that is unconstitutionally vague.

Two days after filing their complaint, Plaintiffs filed a motion to preliminarily enjoin the law before it goes into effect. Plaintiffs allege in their pleadings that the law will have a significant chilling effect on protected speech throughout the State of California – as well as outside its borders.

The motion for a preliminary injunction is currently pending before Judge Whyte of the Northern District of California, and a hearing on the motion is set for December 2.

California's legislation followed quickly on the heels of two other states that recently passed similar laws.

In late July of this year, Illinois passed a law imposing criminal penalties on the sale or rental of "violent" video games to minors under 18. Like California, the Illinois law requires "violent" video game packaging to carry a large "18" sticker, and imposes penalties for failure to label games.

Unlike California, the Illinois law also restricts the sale of "sexually explicit" video games. Although Illinois already has a "harmful to minors" law that covers video games, the State enacted a separate provision applicable only to "sexually explicit" video games.

That provision's definition of "sexually explicit" video games lacks the third prong of the *Miller v. California* standard for obscenity (i.e., that the material sought to be regulated serious literary, artistic, political, or scientific value as to minors). In other words, the Illinois law apparently seeks to regulate video games containing "sexually explicit" images even if the game has serious literary, artistic, political, or scientific value.

(Continued on page 52)

Lawsuits Challenge Three State Laws Restricting Video Game Expression

(Continued from page 51)

For these reasons, plaintiffs – ESA, VSDA, and the Illinois retailers' association – challenged the "sexually explicit" provisions in addition to the law's "violent" video game provisions, arguing that both violated the First Amendment under well-established legal precedent, and that the law was void for vagueness.

Plaintiffs have moved for a preliminary injunction, which is currently pending before Judge Kennelly of the Northern District of Illinois, in Chicago (*Entertainment Software Association v. Blagojevich*). As in California, the law is due to take effect on January 1, 2006. Michigan has also enacted a law regulating "violent" video games.

Michigan's law places civil and criminal penalties on the dissemination or display of "ultra-violent explicit" video games to individuals under age 17. The Act also provides misdemeanor criminal penalties of up to 93 days in prison, a fine of $25,000, or both, for store managers who permit a minor to "play or view the playing" of a prohibited video game. An "ultra-violent explicit video game" is "harmful to minors" – and therefore subject to the Michigan law's restrictions – if it "appeals to the morbid interest in asocial, aggressive behavior of minors," and meets certain other criteria.

Based on a belief that the Michigan law, like the laws in California and Illinois, will impermissibly burden constitutionally protected speech and have a significant chilling effect on free expression, the ESA and VSDA, along with the Michigan retailers association, filed suit in federal district court in Detroit and sought to have the law preliminarily enjoined before its December 1, 2005 effective date (*Entertainment Software Association v. Granholm*).

Similar Statutes Have Been Struck Down

Previous attempts to restrict "violent" video game content have been uniformly invalidated under the First Amendment by the federal courts. In *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("AAMA"), *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("IDSA"), and *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) ("VSDA"), the courts invalidated efforts by Indianapolis, St. Louis, and Washington State, respectively, to restrict minors' access to "violent" video games.

In each case, the courts recognized that video games were entitled to full protection under the First Amendment. *AAMA*, 244 F.3d at 575-76 (likening the "violence" in video games to "violence" in works of "[c]lassic literature and art," which "are saturated with graphic scenes of violence, whether narrated or pictorial," and concluding that "[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty"); *IDSA*, 329 F.3d at 957; *VSDA*, 325 F. Supp. 2d at 1184-85. Each law was held to violate the First Amendment, with the courts holding that they did not satisfy strict scrutiny or the test in Brandenburg v. Ohio for speech restrictions aimed at preventing "violent" behavior. *AAMA*, 244 F.3d at 575-79; *IDSA*, 329 F.3d at 959; *VSDA*, 325 F. Supp. 2d at 1190.

Previous attempts to restrict "violent" video game content have been uniformly invalidated under the First Amendment

In so holding, the courts refused to accept the government defendants' arguments that the laws could be justified under existing precedent on obscenity. *E.g., IDSA*, 329 F.3d at 958 ("Simply put, depictions of violence cannot fall within the definition of obscenity for either minors or adults.").

And in the Washington case, the court held that the statute, which defined the prohibited video games as those containing images of "aggressive conflict" against "a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer," *id*. at 1190, was void for vagueness. The court noted that that the statute on its face may well have applied to games "built around the Simpsons or the Looney Tunes," and observed that because retail clerks could not possibly know which games were covered by the law, they would likely steer far clear of the prohibited zone, to the detriment of free speech. *Id.* at 1190-91.

Katherine Fallow and Paul Smith are partners at the Washington D.C. office of Jenner & Block. Mr. Smith and Ms. Fallow represent the plaintiffs in the three lawsuits.

Third Circuit Rejects Effort to Re-Litigate Case That Established "Military Secrets Privilege"

The Third Circuit in September rejected an effort by lawyers for the daughters of two civilian employees of an Air Force contractor who were killed in a 1948 plane crash to re-litigate a case that led the U.S. Supreme Court to recognized a "military secrets privilege" for sensitive military information. *Herring v. U.S.*, 424 F.3d 38 (3rd Cir. Sept. 22, 2005).

Background

The daughters sought to re-litigate a wrongful death case that had been filed by their mothers against the government in 1949. They asked that the case be re-opened in light of recently declassified documents which they argued show that the military improperly invoked military secrecy in the original proceeding.

The original litigation led to the U.S. Supreme Court's decision in *U.S. v. Reynolds*, 345 U.S. 1 (1953), which established the principle that government could assert a privilege based on the need for military secrecy. In *Reynolds* the Court, in a 6-3 decision, held that courts must balance the asserted need for a document against the requirements of military secrecy, and it reversed a lower court's default judgment entered after the government refused to provide reports on the crash.

The privilege has been invoked at least 60 times to dismiss cases that may encroach on secret government operations, including claims over CIA and NSA electronic surveillance of Vietnam War protestors. More recently, the privilege has been invoked to dismiss a defamation case brought by former Energy Department counterintelligence chief Notra Trulock against former department scientist Wen Ho Lee, who alleged that espionage charges against him were the result of racial profiling by Trulock. *See Trulock v. Lee*, Civil No. 00-01527 (E.D. Va. dismissed Feb. 12, 2002), *aff'd*, 66 Fed.Appx. 472 (4th Cir. June 3, 2003) (available at http://pacer.ca4.uscourts.gov/opinion.pdf/021476.U.pdf).

In their efforts to re-examine the *Reynolds* case, the daughters claimed that reports on the crash, declassified in 2000 without any redactions, do not reveal any past or present military secrets and, instead, simply concluded that the planes were "not considered to have been safe for flight."

Petition to Reopen Case

In 2003, the daughters filed a motion with the U.S. Supreme Court seeking leave to file a petition for a writ of error *coram nobis*. The somewhat obscure writ allows for re-evaluation of a judicial decision in light of the subsequent discovery of an error in matters of fact in a case. The petitioners sought to vacate the *Reynolds* result and reinstate the district court's award with interest – a total of $1.14 million – plus attorneys' fees and costs. They did not challenging the legal holding in *Reynolds* that the government may invoke a privilege to protect government secrets. *See MLRC MediaLawLetter,* March 2002, at 45.

The Supreme Court denied the motion. *In re Herring*, 539 U.S.940 (U.S. 2003); *see MLRC MediaLawLetter* July 2003 at 26.

The daughters then filed a new case in federal court in Philadelphia, seeking $1.1 million in damages for the government's liability in the 1948 crash. The trial court dismissed the suit, concluding that "the accident investigation report itself does not make plain the substance of [the purported] intelligence concerns does not suffice to support a conclusion that disclosure at that time would not have harmed national security or that in so asserting the privilege, the Air Force sought to defraud the Courts." *Herring v. U.S.*, 2004 WL 2040272, at *6 (E.D.Pa. Sept. 10, 2004).

The Third Circuit affirmed last month, finding that the government's actions in the original litigation did not constitute "clear, unequivocal and convincing evidence" of "the most egregious misconduct directed to the court itself." 424 F.3d 38 (3rd Cir. Sept. 22, 2005) (quoting *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir.1976)).

Plaintiffs were represented by Wilson M. Brown III, Lori J. Rapuano, and Angie Halim of Drinker Biddle in Philadelphia. Drinker Biddle founding partner Charles Biddle had represented the widows in the original litigation. The government was represented by Assistant Attorney General Peter D. Keisler, U.S. Attorney for the Eastern District of Pennsylvania Patrick L. Meehan, and Barbara L. Herwig and August E. Flentje of Civil Division Appellate Staff at the Department of Justice.

LEGISLATIVE UPDATE

Federal Shield Law, Cameras in the Supreme Court, EPA Regulations

By Kevin M. Goldberg

The Free Flow of Information Act received a major boost this month when the Senate Judiciary Committee scheduled a hearing for October 19, 2005 at which the Department of Justice was finally to appear and present its views on the issue of a federal shield law.

In addition, legislation was introduced that would accelerate the "cameras in the courts" movement and the Environmental Protection Agency issued a request for comments on their proposal to reduce a reporting burden on private industries that had proven to be helpful in reducing toxic releases into the environment.

Free Flow of Information Act (HR 3323 and S 1419)

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the "Free Flow of Information Act" (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2005 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- These bills were met with some minor concerns from House and Senate staff and the Department of Justice, especially where national security concerns would be implicated and, perhaps, threatened when the identity of a source could not be revealed. For that reason, the bills were redrafted and reintroduced by their original sponsors on July 18, 2005 as HR 3323 and S 1419; the bills now contain the following major provisions:
    - An absolute privilege against compelled testimony before any federal judicial, legislative, executive or administrative body regarding the identity of a confidential source or information that would reveal the identity of that source – unless there exists an "imminent and actual" harm to national security, in which case the reporter may be compelled to testify.
    - A qualified privilege against the production of documents to these bodies unless clear and convincing evidence demonstrates that the information cannot be obtained by a reasonable, alternative non-media source and:
        - (1) in a criminal prosecution or investigation, there are reasonable grounds to believe a crime has occurred and the information sought is essential to the prosecution or investigation or
        - (2) in a civil case, the information is essential to a dispositive issue in a case of substantial importance.
    - Protection for information about a reporter that is sought from a third party, such as telephone toll records or E-mail records, which provides that, in the event that such records are sought, the party seeking the information shall give the covered entity reasonable and timely notice of the request and an opportunity to be heard before the records are disclosed.
    - Definition of a "covered entity", which is the publisher of a newspaper, magazine, book journal or other periodical; a radio or television station, network or programming service; or a news agency or wire service, with a broad listing of media such as broadcast, cable, satellite or other means. It also includes any owner or operator of such entity, as well as their employees, contractors or any other person who gathers, edits, photographs, records, prepares or disseminates the news or information.
    - As mentioned above, the Senate Judiciary Committee convened a second hearing on this issue on October 19, 2005 (there had previously been a hearing in that committee on July 20, 2005).

Cameras in the Supreme Court (S 1768)

- Every year, Senator Charles Grassley introduces a bill that would permit the televising of federal court proceedings. This year was no different, with the intro-

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duction of the Sunshine in the Court Room Act of 2005 (S 829). However, every year the bill gets stonewalled by the House Judiciary Committee because the Chairman of that Committee, Rep. James Sensenbrenner (R-WI) opposes the legislation. This year appears to be no different.

- However, the push for cameras in the courtroom took a marked turn for the better after now-Chief Justice John Roberts intimated during his confirmation hearings that he was not opposed to the televising of Supreme Court proceedings. Soon thereafter, Senator Arlen Spector (R-PA), the powerful chairman of the Senate Judiciary Committee, introduced S 1768, which would accomplish that very act.
- The bill is not the final statement on the matter, allowing the Justices to override the legislation, as it reads in its entirety that: "The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court." Still, there is a presumption of openness that is explicit in the bill and one can presume that most oral arguments would be proper for television.
- The bill has not received any further action since introduction.

Environmental Protection Agency Issues Notice of Proposed Rulemaking on Toxic Release Inventory

- The Environmental Protection Agency ("EPA") has commenced a proceeding whereby the agency plans to reduce the reporting burden imposed on companies that must provide information regarding Toxic Release Inventories. Currently, such companies must file reports with the EPA on an annual basis; in the NPRM linked below, the EPA proposes change that requirement to a report that is filed every 24 months. Of course, this would result in less information available to the public and the press in terms of toxins released into the environment.
- The NPRM was issued despite the EPA's own admission that: "For almost 20 years, EPA's Toxics Release Inventory (TRI) has shown that the amount of toxic chemicals released into the environment by reporting facilities continues to decline. In this year's report, nearly 24,000 facilities reported on approximately 650 chemicals including toxics managed in landfills and underground injection wells as well as those released into water and the air" and that "TRI provides the American public with vital information on chemical releases including disposal for their communities, and is an important instrument for industries to gauge their progress in reducing pollution."
- Members of the public are invited to file comments, which are due December 5. The full text of the NPRM can be found at: http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-19710.pdf

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or Kevin.Goldberg@cohnmarks.com.

ETHICS CORNER

Looming Conflicts Between Lawyer and Client in Electronic Discovery

By Bradley H. Ellis and Frank J. Broccolo

I. Introduction

Zubulake. The very name sends shivers down the spine of even the most diligent practitioner. It is not that lawyers had been shirking their duties regarding discovery of electronic data before United States District Judge Scheindlin of the Southern District of New York started setting the standards. It is just that information preservation and production never used to be so hard or come with such personal risk.

Once upon a time, data collection and production consisted of a simple direction to the client to check the file or storage room for anything relevant, and to have those involved in the particular matter save all the paper they had, gather it together and send it off to counsel. Generally speaking, counsel could rest easy so long as he knew that all of those obvious places had been competently searched, and that the relevant documents had been sequestered and preserved. Now, "documents," broadly defined, hide in the nooks and crannies of unique and complicated electronic information systems – here today and perhaps gone tomorrow depending on whatever whimsical system the in-house "IT" staff has designed for network storage and backup tape rotation. And, there is so much more of it. The paperless age is drowning in a sea of information and choking on miles of magnetic tape that preserves ill-conceived messages no one would have dreamed of writing down twenty or thirty years ago.

So, in the context of this fast paced and fast changing world, we are reminded in *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (July 2004) (*Zubulake V*) that not only do lawyers have a duty to preserve and produce information, they are bound to be *actively* involved in the client's efforts to do so. Today, those duties bring with them a substantial risk of error and heightened potential for an actual conflict with the client.

II. First Principles

A lawyer's duty to preserve and produce documents is nothing new. *See e.g.*, *Mosel Vitelic Corp. v. Micron Tech., Inc.*, 162 F. Supp. 2d 307, 310-12 (D. Del. 2000) (after becoming "aware that evidence might be relevant to a pending or future litigation…when a party or its counsel fails to preserve relevant evidence, the court has the power to impose an appropriate sanction"); *Telecom International Am. Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) ("[o]nce on notice, the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation"). ABA Model Rule of Professional Responsibility 3.4, Fairness to Opposing Party and Counsel, provides that "[a] lawyer shall not":

> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potentially evidentiary value….
>
> * * *
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

As to subparagraph (a) of the rule, the word "unlawfully" connotes a culpable state of mind. But Judge Scheindlin notes that, at least in the Second Circuit, "a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence." *Zubulake V* at 431, *citing Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002). Subparagraph (d) of the rule by its own terms would reach negligent behavior. Moreover, the Comment to this rule makes it expressly applicable to "computerized information." Compliance with Rule 3.4(d), then, requires that counsel "make reasonably diligent effort[s]" to produce "computerized information" to respond to a "legally proper discovery request." Compliance with the spirit of these rules surely means that counsel must also make reasonably diligent efforts to preserve the computerized information in the first place so that it can be produced

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when the discovery request arrives. The question becomes, what does a "reasonably diligent effort" mean when it comes to the preservation and production of electronically stored data? As it turns out, in Judge Scheindlin's courtroom at least, quite a lot.[1]

III. The Electronic Age

Even before Judge Scheindlin issued *Zubulake V*, lawyers should have been on notice that discovery of electronic data was important and had to be handled with care. Indeed, the issue is of such importance and complexity that for several years a number of committees have been engaged in drafting standards and best practices for electronic discovery. *See e.g. The Sedona Principles for Electronic Document Production* (January 2004).

The statistics that document how businesses create information and communicate with each other confirm the importance in litigation of properly searching for electronically stored documents and of ensuring the information is preserved allowing it to be searched. It is estimated that "93 percent of information created today is first generated in digital format, 70 percent of corporate records may be stored in electronic format, and 30 percent of electronic information is never printed to paper." *The Sedona Principles*, 3, *citing* Kenneth J. Withers, *The Real Cost of Virtual Discovery*, 7 Federal Discovery News 3 (Feb. 2001); Lori Enos, *Digital Data Changing Legal Landscape*, E-Commerce Times, May 16, 2000; and Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 Law & Contemp. Probs. 253, 280-81 (Spring/Summer 2001). Thus, there is a significant chance that electronic storage media are the only places where many documents exist. (Certainly, that is where most "smoking guns" seem to be hidden these days.)

And, given the volume of electronic information, the amount of information that has never been put to paper is staggering. For example, the flow of e-mail alone increased from approximately 182.5 billion messages per year in 1998 to an estimated 1.5 billion e-mail messages sent *per day* in 2003. *The Sedona Principles*, 3. To put the sheer volume of electronic data in perspective, in 1998, when merely 182.5 billion e-mail messages were sent, the U.S. Post Office processed a relatively minuscule 1.98 billion pieces of "snail" mail. *Id*.

The problem for the lawyer is not only the volume of electronic information. More bedeviling is the dynamic and unstable nature of electronically stored data. That data may change when being moved or retrieved and it is susceptible of inadvertent destruction. To the latter point, businesses do not need nor do they have the capacity to keep all of the electronic data they generate. Therefore, companies routinely and necessarily discard or overwrite data. That routine must be interrupted when litigation strikes. Informing the client of that fact and of what the disruption may entail will not endear the lawyer to his client or its employees who, after all, have a business to run. When the client pushes back, however, the lawyer would do well to remember that "spoliation" need not be intentional. *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 268 (2nd Cir. 1999) ("a finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator with an adverse inference instruction"); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) ("[w]e reject the argument that bad faith is an essential element of the spoliation rule"); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (a finding of bad faith is not necessary "to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior"). And, with routine processes that discard or overwrite data, the risk of unintended spoliation can be high.

IV. Zubulake V

With that risk in mind, we turn to *Zubulake V*, the latest in a series of opinions regarding electronic discovery issued in what would otherwise be a fairly routine piece of employment discrimination litigation. In *Zubulake V,* the Judge had before her a motion to sanction UBS for failure to produce relevant information and the late production of information. The Court granted the motion, finding that there was willful spoliation. UBS

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had failed to preserve relevant e-mails – even after having been counseled by its lawyers to preserve information – resulting in the production of some e-mail fully two years after it was requested, and the loss of some e-mail entirely.

Having delineated the parties' obligations to preserve and produce information in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*), Judge Scheindlin took the opportunity in *Zubulake V* to set forth counsel's obligations. She concluded that "Counsel must *oversee* compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Id.* at 432 (emphasis added). The duty to "oversee" the party's efforts to retain and produce breaks into two distinct tasks: first, counsel has a duty to locate relevant information, and second, counsel has a continuing duty to ensure preservation. *Id.*

The duty to locate information means that the lawyer must "become fully familiar with her client's document retention policies, as well as the client's data retention architecture," which will "invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy." *Id.* In addition, counsel must speak directly to "key" players in the case to understand how they store information. "Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected." *Id.* But what if the litigation is too large and there are too many "key" employees? Then "counsel must be more creative." Judge Scheindlin posits that "[i]t may be possible to run a system-wide keyword search; counsel could then preserve a copy of each 'hit'." *Id.* at 432. Perhaps to temper what Judge Scheindlin acknowledges are rules that "sound burdensome," the Court ultimately defines the duty of client and counsel to "take *some reasonable steps* to see that source of relevant information are located." *Id.* The problem will come when client and counsel disagree on what is "reasonable" in this context.

The second duty defined by the Court concerns the continuing obligation to preserve information. To satisfy this duty counsel must (1) issue a "litigation hold" which must be periodically re-issued to inform new employees and keep it fresh in the minds of all employees; (2) communicate directly with "key" players the importance of the duty to preserve, who must be periodically reminded of this duty; (3) instruct all employees to produce electronic copies of their relevant active files; and (4) make sure that all backup media which the party is required to retain is identified and stored in a safe place.[2] *Id.* at 432-33. Again, Judge Scheindlin declares that "[a]bove all" these requirements must be "reasonable." *Id.* at 433. The Court described the balance between client and counsel as follows:

> A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without *the active supervision of counsel*.

Id. (emphasis added).

Although the duty imposed on the lawyer is to be "reasonable" and the client is ultimately responsible to preserve documents, it should be emphasized that the Court concludes that the lawyer is to *supervise* the process, making the obligation look more like the parent monitoring the child than the Court allows.

Conflicts – if not outright rebellion – occur between parent and child with some frequency. Similarly, the supervisory role of the lawyer over her client that *Zubulake V* appears to create will inevitably lead to more frequent conflict, particularly in light of the complexities and expense of electronic document preservation and production. In fact, the roles of lawyer and client as defined in *Zubulake V* could yield a subtle but pernicious result, moving the relationship between lawyer and client away from the principles of trust, loyalty, communication and cooperation that the Section 1 rules in the ABA's Model Rules of Professional Responsibility are designed to foster. It is too early to tell whether such an unintended consequence of the rules set down in *Zubulake V* will obtain. But it is not too early to anticipate that those rules will engender more frequent conflict between lawyer and client.

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V. Conflicts on the Horizon

The potential for conflict with a client in connection with discovery is not a creature of the "Information Age." So long as lawyers have had duties as officers of the court to ensure preservation and production of documents, the potential for conflict with recalcitrant or even just negligent clients has existed. *See e.g.*, ABA Model Rules of Professional Responsibility, Rule 4.1 ("a lawyer shall not knowingly…fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client").

But, the stern warnings from *Zubulake V* that lawyers must remain actively engaged in the preservation and protection process and, indeed, must oversee and supervise those efforts, when doing so means immersing yourself in the murky world of electronically stored data, serves to highlight the increased odds that potential conflicts will become actual conflicts. Indeed, where the potential for spoliation exists, attorneys' interests are directly impacted as counsel is also subject to sanctions depending upon their involvement, or nonfeasance, respecting the loss of relevant information. *See e.g.*, *Bradley v. Sunbeam Corp.*, 2003 U.S. Dist. LEXIS 14451, *42 (N.D. W. Va. 2003) (imposing sanctions against defendant and its national counsel, who approved defendant's conduct that resulted in the spoliation of evidence, but refusing to impose sanctions against defendant's other counsel of record, who was neither a party to, nor aware of, the destruction of evidence).

Moreover, when clients face evidentiary or, worse, terminating sanctions, it will only be natural that they will turn to their lawyers, and ask how counsel let them get into that position. *See e.g.*, *Silvestri v. GMC*, 271 F.3d 583, 589 (4th Cir. 2001) (after plaintiff's case was dismissed as a sanction for spoliation of evidence, plaintiff argued on appeal that "any act of spoliation was that of attorney Moench, hired by his parents, not him"). *Zubulake V's* mandate that counsel must actively involve themselves in their clients' preservation and production of electronic data only increases the likelihood that these types of conflicts will occur.

To avoid this type of unfortunate dispute between counsel and client, note should be taken of Judge Scheindlin's diagnosis of what went wrong in the case before her, placing blame for the failings of UBS on a "failure to communicate" between lawyer and client. *Zubulake V* at 424. Indeed, when potential litigation appears on the horizon, both attorney and client will benefit from a strong written record that delineates a client's obligations to preserve information and, to the extent that duty is unclear, the risks of failing to take additional precautions to ensure that electronic discovery is maintained. To the extent any ambiguity exists respecting a client's obligations under applicable law, an informed client is generally in the best position to determine whether the cost of altering its information retention policies makes sense in light of the potential harm that might result if its preservation of potentially relevant evidence is, in hindsight, found to be lacking.

Where there is disagreement and counsel is not permitted to exercise the degree of supervision envisioned in *Zubulake V*, counsel will need to consider her options. For example, what happens if when discovery has nearly closed, a client discovers additional backup tapes that are responsive to the opposing party's document requests, but the client resists fulfilling its obligations under Federal Rule of Civil Procedure 26(e), which requires that a party timely amend responses to discovery requests and provide "additional or corrective information" to the opposing party? The temptation to refrain from disclosing such information will be heightened where the client risks incurring an exorbitant expense if the Court orders the company to restore, review and produce the tapes, and might incur sanctions for not locating and producing these responsive materials sooner.[3] If the client forbids its attorney to fulfill the client's (and its attorney's) discovery obligations, one option counsel may have to consider is withdrawal from representation.

Model Rules of Professional Responsibility Rules 1.2 and 1.16(b)(4) permit resignation when "the client insists upon taking action . . . with which the lawyer has a fundamental disagreement." No one can doubt that liberal discovery is at the heart of our civil litigation process and is intended to foster the search for truth. A

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disagreement about what needs to be done to comply with the rules governing the preservation and production of electronic data, then, could easily qualify as a fundamental one. Given the complexities and often significant expense inherent in handling the massive amount of electronic information that exists today, the duties of counsel articulated in *Zubulake V* may cause the interests of counsel and client to clash much more frequently than in the pre-digital age.

VI. Conclusion

Harking back to another era in television, on the acclaimed series *Hill Street Blues*, police watch sergeant Phil Esterhaus ended his morning briefing of his officers with a warning "And hey – let's be careful out there." (His successor, Sgt. Stan Jablonski, sent his troops off with a different message: "Let's do it to them before they do it to us." That exhortation seems at odds with the spirit of Judge Scheindlin's decisions.) Sgt. Esterhaus's warning to his police officers applies in spades to lawyers who are sent off to oversee and manage preservation and production of electronically stored information. The chances for error and resulting conflict with the client are high. Be careful out there.

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[1] While this article focuses on Judge Scheindlin's *Zubulake V* opinion, it must be remembered that the rules vary from jurisdiction to jurisdiction. For example, with respect to cost shifting in discovery of electronic data, California, as it is wont to do, is charting a sharply different course from that articulated in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) ("*Zubulake I*"). *See*, Cal. Code of Civ. Pro., Section 2031.280(b); *Toshiba America Electronic Components, Inc. v. Superior Court*, 124 Cal.App.4th 762, 770 (2004) (recognizing that the cost shifting provision in the California Code of Civil Procedure "conflicts with the federal rule…[but surmising] that the Legislature intended it to be that way").

[2] In *Zubulake I*, when analyzing appropriate cost-shifting of the expense of electronic data production, the Court described the various types of electronic information on a continuum from most accessible to least accessible. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319 (S.D.N.Y. 2003). Backup tapes are considered to be relatively inaccessible. *Id*. In *Zubulake IV*, the Court opined that "a party need not preserve all backup tapes even when it reasonably anticipates litigation." *Zubulake IV* at 217-18 ("[a]s a general rule, [the] litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy"). However, "if a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available." *Id* at 218.

[3] Note should be taken that the most important spoliation cases to date in the context of electronic discovery have all involved large, well-heeled entities with the resources to properly attend to their duties as defined in the *Zubulake* opinion series. Those same rules and obligations with their attendant expense may not be feasible for smaller businesses. *Zubulake I* does list relative ability to pay as one of seven factors to be weighed when determining whether cost-shifting should occur. 217 F.R.D. at 322-324. However, given the expense of restoration and production of inaccessible data (e.g. backup tapes) courts may soon need to consider financial means as a factor in whether discovery should be had at all.